SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. _____

THE WESTERN UNION TELEGRAPH COMPANY,) Petitioner.

versus

MARY RUTH SPARKS, Respondent.

TRANSCRIPT OF RECORD.

The Appendix filed in the United States Court of Appeals for the Sixth Circuit [Pursuant to its Rule 16, as authorized by Rule 75 (1) of Federal Rules of Civil Procedure], and the Proceedings in that Court.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

October Term, 1956.

No. 13,019

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - - - Appellant,

versus

MARY RUTH SPARKS, - - - - - - Appellee.

On appeal from the United States District Court for the Western District of Kentucky, Louisville Division; Hon. Henry L. Brooks, District Judge, presiding.

APPENDIX TO BRIEF

OF

THE WESTERN UNION TELEGRAPH COMPANY

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

Civil Action, No. 2806.

MARY RUTH SPARKS, - - - - Plaintiff,

v.

WESTERN UNION TELEGRAPH COMPANY, INC., - - - - - - Defendant.

COMPLAINT*

[Filed June 22, 1954]

1. Plaintiff, Mary Ruth Sparks, says that she is a resident of Jefferson County, Kentucky, and that the defendant, Western Union Telegraph Company, Inc., is a corporation duly created by law, authorized to do business in Jefferson County, Kentucky, and having offices in Louisville, Kentucky, with power to sue and be sued.

2. Plaintiff states that on March 8, 1954, and for a long time prior thereto, the defendant owned and maintained a manhole cover located in the east crosswalk crossing Market Street at Fourth Avenue, approximately in the middle of Market Street, in Louisville, Jefferson County, Kentucky. She states that the defendant, by and through its agents and servants, installed and maintained the afore-

*Mrs. Sparks brought her suit in the Jefferson Circuit Court; and Western Union duly removed it to the Federal Court, upon the ground of diversity of citizenship, pursuant to Title 28, U. S. Code, §§ 1441, *et seq.*

mentioned manhole cover located in said public crosswalk in a defective and dangerous condition, in that said manhole cover contained holes. She says that on March 8, 1954, at approximately 9:30 A.M., while walking within the aforesaid crosswalk, she stepped on the aforementioned manhole cover, whereupon her heel went into one of the holes in the manhole cover, and she was caused to fall; and as a result thereof sustained serious, painful and permanent injuries to her right leg, fracturing her right kneecap, for which injuries she was caused to suffer, and will in the future suffer, great physical pain and mental anguish, and great and permanent shock to her nerves and nervous system; and that her power to work and earn money has been permanently impaired, all to her damage in the sum of Fifteen Thousand Dollars ($15,000).

3. Plaintiff further states that as a result of her injuries, it was necessary for her to employ physicians and surgeons and to be hospitalized, and that she has undergone and may have to undergo further major operations; and that her hospital, medical and surgical expenses will amount to not less than Twelve Hundred Dollars ($1,200.00).

4. Plaintiff says that she was gainfully employed at the time of the above mentioned accident, and the incurring of the aforementioned injuries, and was able to earn Seventeen Dollars ($17.00) per week; and as a result of her injuries, it will be necessary for her to be disabled for at least fifty-two (52) weeks, to her further damage in the sum of Eight Hundred Eighty-four Dollars ($884.00).

5. Plaintiff states that all of her injuries were brought about by the gross carelessness and negligence of the defendant, its agents and servants in the construction and maintenance of said manhole cover on said public crosswalk, in a highly defective and unsafe condition, and that its agents and servants knew, or by the exercise of ordinary care could have known, of said condition.

WHEREFORE, plaintiff, Mary Ruth Sparks, demands judgment against the defendant, a corporation, in the sum

of Seventeen Thousand Eighty-four Dollars ($17,084.00); for her costs herein expended and for all further relief.

Plaintiff demands a trial by jury.

S. J. Stallings
Attorney for Plaintiff
Kentucky Home Life Building

R. P. Hobson
Attorney for Plaintiff
Woodward, Hobson & Fulton
1805 Kentucky Home Life Building
WAbash-3321

ANSWER

[Filed July 26, 1954]

The defendant, Western Union Telegraph Company, Inc., for answer says:

First Defense

The Complaint fails to state a claim against Western Union upon which relief can be granted.

Second Defense

1. It admits the allegations contained in Paragraph 1 of the Complaint.

2. It admits that on March 8, 1954, and for sometime prior thereto, it owned and maintained a manhole cover located in the East cross-walk crossing Market Street at Fourth Avenue in Louisville, Jefferson County, Kentucky; denies that it, by and through its agents and servants, installed and maintained said manhole cover in a defective and dangerous condition; but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 2 of the Complaint.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint.

4. It is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint.

5. It denies the allegations contained in Paragraph 5 of the Complaint.

Third Defense

At the time and place complained of in the Complaint, the plaintiff, Mary Ruth Sparks, was herself guilty of contribtuory negligence and but for such contributory negligence, the accident and injuries complained of in the Complaint could not and would not have occurred.

WHEREFORE, the defendant, Western Union Telegraph Company, Inc., having fully answered, demands that plaintiff's Complaint be dismissed; that it recover its costs herein expended, and any other relief to which it may be entitled.

Wm. Marshall Bullitt
Thos. S. Dawson
1700 Kentucky Home Life Bulg.
Louisville 2, Kentucky
Attorneys for Defendant

[Certificate of Service of Answer is omitted]

AMENDED COMPLAINT
[Filed October 27, 1955]

Plaintiff amends her complaint herein and says that she has expended or become indebted for hospital, medical, surgical, transportation and help for herself $2324.00 and that to date she has lost time for 79 weeks at $17.00 a week amounting to $1343.00.

WHEREFORE, plaintiff, Mary Ruth Sparks, prays judgdment for $18,667.00.

Robert P. Hobson
Woodward, Hobson & Fulton
1805 Kentucky Home Life Building
Louisville, Kentucky
Attorneys for Plaintiff.

[Certificate of Service of Amended Complaint is omitted]

ANSWER TO AMENDED COMPLAINT
[Filed October 29, 1955]

The defendant, Western Union Telegraph Company, is without knowledge or information sufficient to form a belief as to the truth of any of the allegations which are contained in the Amended Complaint.

WHEREFORE, the defendant, Western Union Telegraph Company, prays as heretofore.

Wm. Marshall Bullitt
Bullitt, Dawson & Tarrant
1700 Kentucky Home Life Building
Louisville 2, Kentucky
Counsel for Defendant.

[Certificate of Service of foregoing Answer, etc., is omitted]

DEFENDANT'S MOTION FOR A DIRECTED VERDICT

[Filed November 4, 1955]

The defendant, Western Union Telegraph Company, moves for a directed verdict in its favor, upon the following specific grounds:

(1) There is not any evidence that Western Union Telegraph Company was negligent in its construction, designing or maintenance of the manhole cover which is referred to in the Complaint, or that it failed to maintain that manhole cover in a reasonably safe condition.

(2) The manhole cover referred to in the Complaint, and the holes located in that cover were clearly visible to the plaintiff, Mary Ruth Sparks, at the time of her fall which is referred to in the Complaint; and she was guilty of contributory negligence as a matter of law.

Bullitt, Dawson & Tarrant
Counsel for Western Union
Telegraph Company.

DEFENDANT'S REQUEST FOR INSTRUCTIONS

[Filed November 4, 1955]

The defendant, Western Union Telegraph Company, requests that the Court instruct the Jury as follows:

I. On March 8, 1954, at the time and place referred to in Mrs. Sparks' Complaint, Western Union Telegraph Company was prohibited by an *Ordnance* of the City of Louisville, Kentucky, and since about 1906 it had been prohibited by that *Ordnance*, from having its telegraph wires located above the surface of the streets of Louisville; and, therefore, in order to carry on its business as a public utility in Louisville, it had to have its telegraph wires underground, that is, under the surface of the streets.

It was reasonably necessary that Western Union Telegraph Company have manholes, including the manhole in

question, down through the street pavement, to provide access by its employees to its underground telegraph wires and facilities, so that it could repair and maintain them; and that it have covers upon the tops of those manholes.

II. It was a reasonable precaution for Western Union Telegraph Company to take, to have holes in those manhole covers, including the manhole cover in question, for two reasons: *First:* To permit the escape through those holes in the covers of gases, which tend to accumulate in those underground facilities and manholes, and which, if allowed to remain in them, might become highly dangerous, and either poison its workmen who might have occasion to be in the manholes or explode and injure or even kill its workmen or other persons in the immediate vicinity or damage or injure property in that vicinity; and *Secondly,* To permit its workmen, by the insertion in those holes in the covers of lifting tools or devices, to remove the covers temporarily, on occasion when they had work to do down in the manholes, to repair or maintain the Company's underground wires and facilities.

III. On March 8, 1954, at the time and place referred to in Mrs. Sparks' Complaint, Western Union Telegraph Company was not an insurer or a guarantor of the safety of pedestrians, including Mary Ruth Sparks, who might be walking on or over the street in which the manhole in question was located, or on or over the cover on that manhole.

IV. There is not any evidence that the cover on the manhole in question had become defective from wear or injury or other cause, or that it was in any way out of repair, or that it was inherently dangerous either in construction, design or the maintenance of it.

V. The mere fact, if it be a fact, that Mary Ruth Sparks' shoe heel caught in one of the holes in the manhole cover in question, or that thereby she was caused to fall, is not any evidence of any negligence on the part of Western Union Telegraph Company in the construction, design or maintenance of that manhole cover; and the Telegraph

Company did not have any duty to change the design of the covers, or the holes in the covers on account of any change of fashion in the heighth or size or shape of the heels on ladies shoes, including Mrs. Sparks' shoes, which may have occurred since that cover originally was placed on the manhole in question.

VI. On March 8, 1954, at the time and place referred to in Mrs. Sparks' Complaint, it was Western Union Telegraph Company's duty to exercise ordinary care to see that the cover on the manhole in question was constructed, designed and maintained in a reasonably safe condition for travel by pedestrians, including Mrs. Sparks, on or over the street at the place in which the manhole was located.

If the Jury shall believe from the evidence that the Telegraph Company failed in its performance of that duty, and shall further believe that its said failure, if any, was the proximate cause of Mrs. Sparks' injuries which are referred to in her Complaint, then, the Jury will find for the plaintiff, *unless* the Jury shall believe from the evidence that Mrs. Sparks, herself, failed to exercise ordinary care for her own safety as she walked from the North line toward the South line of Market Street at its intersection with Fourth Street.

VII. On March 8, 1954, at the time and place referred to in Mrs. Sparks' Complaint, the manhole cover in question and the holes located in that cover all were clearly visible to Mrs. Sparks, as she walked on or over the top of that manhole cover.

VIII. It was Mrs. Sparks' duty to exercise ordinary care for her own safety in walking on or over that manhole cover, from the North line toward the South line of Market Street at its intersection with Fourth Street.

If the Jury shall believe from the evidence that Mrs. Sparks failed to exercise such ordinary care for her own safety, the Jury will find for Western Union Telegraph Company, even though the Jury might believe from the evidence that Western Union Telegraph Company may have failed in one or more of its duties as set forth in these instructions.

As used in these instructions, "Negligence" means the failure to exercise "Ordinary Care"; and "Ordinary Care" means that care exercised by ordinarily prudent persons under the same or similar circumstances.

Bullitt, Dawson & Tarrant
Counsel for Defendant.

ORDER AND VERDICT

[November 4, 1955]

Pursuant to Order, this case was called for trial at 9:30 A.M., on November 3, 1955, and there appeared for the plaintiff, Samuel J. Stallings, and Robert P. Hobson; and for the defendant, William Marshall Bullitt and R. Lee Blackwell. Both sides announced ready and the following jury:

Mrs. Christine Leonard	Frank H. Gregg
Mrs. Nancy Jensen	Charles Hagan
Samuel Bidwell	Clyde L. Breland
Charles B. Ernst	Wilbur Terry
R. B. Moore	Wm. K. Herdt, Sr.
G. C. Speck	James H. Martin

was sworn to answer questions concerning qualifications and sworn to try this case.

Opening statements were made by Mr. Stallings and Mr. Blackwell. Evidence for the plaintiff was begun. At 12:27 P. M., Court recessed until 2:00 P.M. Evidence for the plaintiff was resumed and concluded. The defendant, by counsel, moved the Court to direct a verdict for the defendant. This motion was heard in chambers and overruled. Evidence for the defendant was begun and at 4:57 P.M., Court adjourned until 9:30 A.M., November 4, 1955.

Court convened on November 4, 1955, and evidence for the defendant was resumed and concluded. At 12:10 P.M., Court recessed until 2:00 P.M.

The defendant filed a written motion for a directed verdict, which was overruled.

This case was argued by Mr. Blackwell and Mr. Hobson.

Both the plaintiff and defendant tendered instructions, however, the Court gave his own instructions to the Jury.

At 3:09 P.M., the jury retired to consider the case and returned at 4:14 P.M., with the following verdict which was read by the Clerk in open Court and in the presence of the parties:

> "We, the Jury, find for the plaintiff, Mary Ruth Sparks, in the sum of
>
> $2300.00 for Hospital and Doctors bills
> 1300.00 for Loss of time
> 14400.00 for Damages
> $18000.00—total
>
> (s) Frank H. Gregg
> Foreman"

The jury was discharged and Court adjourned.

Henry L. Brooks
Judge, United States District Court

November 4, 1955.

Western Union Telegraph Co.'s Motion (1) To Set Aside Verdict and Judgment thereon, and (2) To Enter Judgment in Accordance with its Motion for a Directed Verdict.

[Filed November 12, 1955]

The Defendant, Western Union Telegraph Company [hereafter called Western Union], moves, under Rule 50 (*b*) of the Federal Rules of Civil Procedure, (1) That the Verdict which was received herein on November 4, 1955, and any Judgment entered thereon, each be set aside and vacated; and (2) That Judgment be entered herein for Western Union, in accordance with its Motion for a Directed Verdict which it made at the close of all of the evidence.

The Grounds for this Motion are:

I. There was *not* any evidence (*a*) That Western Union was negligent, or failed to use or exercise ordinary care, in its installation, construction or maintenance of the manhole cover which is referred to in the Complaint; or (*b*) That it failed to use or exercise ordinary care to see that the manhole cover was installed, constructed and maintained in a condition for reasonably safe travel by pedestrians, on or over the street at the place therein in which the manhole cover was located, when such pedestrians, including the Plaintiff, exercised ordinary care for their own safety; or (*c*) That there was any defect or dangerous condition in the manhole cover, or in its installation, construction or maintenance, which was the proximate or any cause of the Plaintiff's injuries, which are referred to in her Complaint.

II. The evidence showed, without contradiction, (*a*) That the manhole cover which is referred to in the Complaint, and the holes in that cover, all were clearly visible to the Plaintiff at the time of her fall which is referred to in the Complaint; and (*b*) That the Plaintiff, at the time she fell, failed to use or exercise ordinary care for her own safety, and was herself guilty of negligence as a matter of law, which caused or contributed to her said injuries.

Wm. Marshall Bullitt,
Bullitt, Dawson & Tarrant,
Counsel for Defendant
Address: 17th floor Ky. Home Life Bldg.,
Louisville, Ky.

[Citation of authorities, Notice of hearing, and Certificate of Service are all omitted]

WESTERN UNION TELEGRAPH CO.'S MOTION FOR NEW TRIAL

[Filed November 12, 1955]

The Defendant, Western Union Telegraph Company [hereafter called Western Union], moves, under Rule 59 (*a*) of the Federal Rules of Civil Procedure, for a New Trial on all of the issues herein, for each of the following reasons, and errors which occurred at or during the trial hereof, each of which affects Western Union's substantial rights, to-wit:

I. The Court *erred* in failing and in refusing, at the close of all the evidence, (*a*) To grant Western Union's Motion for a Directed Verdict in its favor, and (*b*) To Direct a Verdict in its favor.

II. The Court *erred* in failing and in refusing to instruct the Jury on the law as set forth in the Instructions numbered I, II, III, IV, V, VI, VII and VIII, and in each of them, of the Instructions which Western Union requested the Court to give to the Jury (by Western Union's written requests which it filed at the close of the evidence),* and to the failure of the Court to give each of which Western Union objected before the Jury retired to consider its Verdict.

III. The Court *erred* in giving to the Jury the following instruction, to which Western Union objected before the Jury retired to consider its Verdict, to-wit:

> "And the Court instructs you that it was the legal duty of the defendant, Western Union Telegraph Company, to exercise ordinary care to see that the cover on the manhole in question was constructed, designed and maintained in a reasonably safe condition for the use of pedestrians using and walking on the crosswalk, including the plaintiff here, Mary Ruth Sparks. And if you believe from a preponderance of the evidence in this case that the defendant failed to perform this duty, and that by reason thereof the plaintiff was caused to fall and be injured, then the law of this case is for the plaintiff, Mary Ruth Sparks, and against the defendant,

*Pages 6a-9a, *supra.*

Western Union Telegraph Company, and the jury will so find, unless the jury *further* believes from the evidence that Mrs. Sparks herself failed to exercise ordinary care for her own safety at the time that she walked on the manhole cover in question and that but for such failure on her part this accident would not have occurred."

The Court's error was that the Court's inclusion in that instruction of the word "further" *forbade* the Jury to find that the Plaintiff "herself failed to exercise ordinary care for her own safety at the time she walked on the manhole cover in question" (that is, was herself guilty of negligence) unless the Jury *also* first found that Western Union had "*failed* to perform" its "legal duty" as set forth in that instruction (that is, was also negligent); *whereas* the Plaintiff's own negligence would bar her from recovery even though Western Union was *not* negligent, and thus the Court forbade the Jury to consider the question of the Plaintiff's own negligence *independently* of the question of Western Union's alleged negligence.

IV. (*a*) The evidence is not sufficient to support or justify, and does not support or justify, the Verdict; (*b*) The Verdict is not supported by any substantial evidence, is clearly against the clear weight of the evidence, is contrary to law and right and justice, and results in a shocking miscarriage of justice; and (*c*) The Jury, in rendering the Verdict, arbitrarily disregarded the evidence and the Court's instructions to the Jury, acted capriciously and with prejudice and bias against Western Union, and based its Verdict upon speculation and unwarranted supposition.

V. The amount awarded to the Plaintiff, by the Verdict, is grossly excessive, shocks the conscience and moral sense, and was the result of the Jury's caprice, sympathy and partiality in favor of the Plaintiff, and passion, prejudice, and bias against Western Union.

Wm. Marshall Bullitt,
Bullitt, Dawson & Tarrant,
Counsel for Defendant
Address: 17th floor Ky. Home Life Bldg.,
Louisville, Ky.

[Citation of authorities, Notice of hearing and Certificate of Service all are omitted]

MEMORANDUM

[Filed June 1, 1956]

This action is submitted on the motion of the defendant, Western Union Telegraph Company, to set aside a jury verdict for the plaintiff, Mary Ruth Sparks, and to enter judgment in accordance with defendant's motion for a directed verdict.

The facts surrounding the accident in which the plaintiff was injured are not disputed. The plaintiff was crossing Market Street at the intersection of Fourth and Market Streets in Louisville, Kentucky, in a designated crosswalk when she stepped on a manhole cover maintained by the defendant. The manhole cover, which was located approximately in the middle of the crosswalk was 27 inches in diameter and there were four holes of one inch in diameter in its cover. Plaintiff's heel, which was approximately 7/8 of an inch in diameter, went into one of these holes causing her to fall, resulting in the injuries for which she obtained her verdict.

The defendant introduced evidence to show that there are over 5523 manhole covers maintained in the City of Louisville and that there are many catch basins, cellar doors and coal holes with openings as large or larger than the one inch holes in the Western Union manhole cover in question. It was argued that a reasonable man would not have anticipated the danger inherent in manhole covers with holes in them, since manhole covers are in such common use that a person is held to know and appreciate their potential danger and that no property owner should be held to anticipate that any injury will ever occur by reason of the existence of such a commonplace condition.

Strong reliance is placed upon what the defendant designates as the "common use" doctrine as applied in the case of Greater Louisville First Federal Savings and Loan Association v. Stone, 242 SW. 2 739 (Kentucky 1951). In this case a child 15 months old was burned by a hot exposed radiator pipe in a building into which he had accompanied his mother. In reversing a jury verdict for the plaintiff the Court said:

"In the instant case, an uncovered radiator pipe is a thing in common use. It is a matter of common knowledge that uninsulated radiator pipes exist everywhere. There is no difference in principle between an exposed radiator pipe and an unguarded hot coal stove. Formerly, coal stoves were in general use and are still to be found in most rural homes and in many small town business places. A hot object is not inherently attractive to children and is dangerous only when contact is made with it. No one would assume, or even argue, that a country merchant would be liable to a child that came into his store and received a burn by touching a red hot stove. With reference to radiators, and likewise with hot stoves, the practice of not covering or guarding them is so usual and widespread that no property owner should be held to anticipate that any injury would ever occur by reason of the existence of such a commonplace condition. We cannot read into this case positive, active negligence upon the part of appellant. The care taken by people generally to prevent injury from instruments of common use is the proper criterion for courts to consider in determining what constitutes due care with respect to the use of such instruments. An uncovered radiator pipe is an instrument in common use, and it is a standard, approved practice to leave radiator pipes exposed. Therefore, having and keeping radiator pipes uncovered in a building, is not a negligent act upon the part of the possessor of property."

There is no doubt that manhole covers, like uncovered radiator pipes and unguarded hot stoves are things in common use. And if the fact of common usage alone made the "common use" doctrine applicable, there would have been no factual issue to present to the jury in this case. However, for the doctrine of Greater Louisville to apply, it must be shown, first, that the public knows or in the exercise of ordinary care should know that manhole covers like hot water pipes and hot stoves are dangerous when contact is made with them. And secondly, that the practice of not guarding manhole covers "is so unusual and widespread that no property owner should be held to anticipate

that any injury would ever occur by reason of the existence of such a commonplace condition."

Obviously it is a matter of common knowledge that hot objects such as exposed hot radiator pipes and unguarded hot coal stoves will burn a person who touches them. However, it cannot be said from the evidence in this case that it is a matter of common knowledge that stepping on a manhole cover is inherently dangerous and will result in injuries. The evidence disclosed that manhole covers are of many different designs, particularly as to the number and size of holes that are in them. Some manhole covers have a substantial number of holes in their tops that cause the covers and their injury causing potential to be easily noticed by a pedestrian exercising ordinary care for his own safety. Such manhole covers with a substantial portion of their area covered with holes creates a situation comparable to a sidewalk grill discussed in the case of McQuillan v. City of New Orleans, 18 So. 2d 218 (1944), where the Court directed a verdict for the defendant. The situation is also comparable to the catch basin case. City of Louisville v. Moore, 267 Ky. 536, 102 SW. 2d 989 (1937) wherein the catch basin was described as being 30¾ inches long by 22⅕ inches wide with a grating consisting of cast iron bars running crosswise of the width, the distance between the bars being ¾ of an inch, and the defendant received a directed verdict as was also awarded in McNeal v. City of Louisville, 287 Ky. 83, 151 SW. 2d 749 (1941).

However, there are manhole covers without any holes in them. Others may have a single hole in the middle of the cover or a single slanted hole in the edge of the cover to accommodate a hook to lift it. Certainly covers without holes are not dangerous, nor are covers that have such small holes that a heel could not enter them. Clearly, the danger area of a manhole cover is proportionate to the number and size of holes in it. It also must not be overlooked that the particular location of manhole covers in the streets and sidewalks is extremely important in determining their potential for danger. Under these circumstances, therefore, if cannot be said as a matter of law that it is common knowledge that all manhole covers as a class, like the hot stoves and exposed hot pipes referred

to in Greater Louisville are inherently dangerous to anyone coming in contact with them.

The facts in the present case are also distinguishable from Greater Louisville in the second particular referred to above because of the plaintiff's evidence that the danger of unguarded holes in manhole covers has been anticipated. In Greater Louisville witnesses for the defendant testified that it was not customary or usual to cover radiator pipes. An expert witness for the defendant testified that he had never known a case where the return pipes on radiators were required to be insulated. This same witness produced specifications at the trial covering housing projects in Louisville which provided that all return pipes to radiators should not be covered. Nowhere in the opinion is there a record of any evidence produced by the plaintiff in contradiction of the above testimony. Here plaintiff has presented evidence showing that the Louisville Gas and Electric Company, anticipating the danger in one-inch openings in manhole covers has maintained the general practice for fifteen years of placing rivets in the manhole cover openings so as to provide a cover for them, thereby reducing the danger to pedestrians. Louisville Gas and Electric Company maintains over one thousand manholes in Louisville or approximately one-fifth of the total number of manholes in the city. The defendant, Western Union, maintains approximately one hundred fifty manholes in Louisville. Plaintiff also produced testimony showing that the "modern trends" among companies maintaining manhole covers is to provide some protection for the openings in manhole covers.

It therefore cannot be said as a matter of law as said in Greater Louisville that "the practice of not covering or guarding them is so usual and widespread that no property owner should be held to anticipate that any injury would ever occur by reason of the existence of such a commonplace condition. . . . Furthermore, as Justice Holmes said in Texas & P. R. Co. v. Behymer, 189 U. S. 468, "What usually is done may be evidence of what ought to be done but what ought to be done is fixed by a standard

of reasonable prudence, whether it usually is complied with or not."

For the above reasons defendant's proof of the common use of manhole covers with holes in them was insufficient to conclusively sustain its claim of immunity. Empire Oil & Refining Co. v. Hoyt, (6 Cir.) 112 F. 2d 356, 361. Under the particular facts of this case it was the duty of the defendant to exercise ordinary care to see that the manhole cover in question was constructed, designed and maintained in a reasonably safe condition for pedestrians using the crosswalk where plaintiff was injured. Whether defendant was negligent in this regard was a question for the jury.

Defendant's motion to set aside the verdict and judgment thereon and to enter judgment in accordance with its motion for a directed verdict is overruled. Defendant's motion for a new trial is likewise overruled. Counsel for plaintiff will prepare appropriate order.

Henry L. Brooks
United States District Judge

June 1, 1956

For the Plaintiff:
Mr. S. J. Stallings
Mr. Robert P. Hobson

For the Defendant:
Bullitt, Dawson & Tarrant

ORDER
[June 11, 1956]

This action having been submitted on motion of defendant, Western Union Telegraph Company, to grant it a new trial and to enter judgment in accordance with defendant's motion for a directed verdict and the Court being sufficiently advised.

IT IS NOW ORDERED that defendant's motions for a new trial and to enter judgment for defendant in accordance with defendant's motion for a directed verdict be and each of them now is overruled.

Henry L. Brooks
Judge
6-11-56

[Certificate of Service of Order is omitted]

JUDGMENT
[June 11, 1956]

The jury having returned its verdict awarding plaintiff $18,000.00 against defendant.

IT IS NOW ORDERED AND ADJUDGED that plaintiff, Mary Ruth Sparks, recover of defendant, Western Union Telegraph Company, $18,000.00 with interest thereon at 6% from this date until paid, together with her costs herein, for all of which she may have execution.

June 11, 1956

Henry L. Brooks
United States District Judge

For the Plaintiff:
Mr. S. J. Stallings
Kentucky Home Life Bldg.
Mr. R. P. Hobson
Kentucky Home Life Bldg.

For the Defendant:
Mr. Lee Blackwell
Kentucky Home Life Bldg.

NOTICE OF APPEAL

[Filed July 9, 1956]

Notice is hereby given that The Western Union Telegraph Company, the Defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit, from the Judgment which was entered in this action on June 11, 1956.

R. Lee Blackwell
Bullitt, Dawson & Tarrant
Counsel for The Western Union
Telegraph Company
Address: 17th floor Ky. Home
Life Bldg.,
Louisville, Ky.

SUPERSEDEAS BOND

[Filed July 9, 1956]

Know All Men by These Presents:

That The Western Union Telegraph Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Mary Ruth Sparks, in the full and just sum of $19,500.00, to be paid to the said Mary Ruth Sparks, her heirs, personal representatives, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this July 9, 1956.

WHEREAS, in the action pending in the United States District Court, for the Western District of Kentucky, Louisville Division, between Mary Ruth Sparks, plaintiff, and The Western Union Telegraph Company, defendant, a Judgment was entered on June 11, 1956, against the defendant, The Western Union Telegraph Company, which has filed in such Court its Notice of Appeal therefrom to the United States Court of Appeals for the Sixth Circuit.

Now, Therefore, the condition of this obligation is such that (1) if for any reason the appeal is dismissed or if the Judgment is affirmed, and The Western Union Telegraph Company and Fidelity and Deposit Company of Maryland shall satisfy the Judgment in full together with costs, interest, and damages for delay, or (2) If there is any modification of such Judgment and The Western Union Telegraph Company and Fidelity and Deposit Company of Maryland shall satisfy in full such modification of the Judgment and such costs, interest, and damages as the United States Court of Appeals for the Sixth Circuit may adjudge and award, then the above obligation shall be void.

Otherwise, the same shall be and remain in full force and effect.

The Western Union Telegraph Company
By Wm. Marshall Bullitt
Attorney

Fidelity and Deposit Company of Maryland
By Chas. E. Hoge [Seal]
Attorney-In-Fact

Approved:
Henry L. Brooks
Judge

7-9-56

AGREED ORDER

[July 17, 1956]

By agreement between the parties, and the Court being advised,

It Is Ordered, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, that the time within which The Western Union Telegraph Company may file the Record on Appeal in the Office of the Clerk of the United States Court of Appeals for the Sixth Circuit, and cause its appeal to be there docketed, be, and hereby it is, extended to and including October 6, 1956.

Entered July 17, 1956.

Henry L. Brooks
Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,

vs.

MARY RUTH SPARKS, Appellee.

Appeal from the United States District Court
For the Western District of Kentucky,
Louisville Division.

TRANSCRIPT OF THE TESTIMONY AND PROCEEDINGS

(Filed August 8, 1956)

On Thursday, November 3, 1955, at 9:30 A.M., the captioned case was called for trial, attorneys for both parties announced ready, a jury was selected to try the case, and the following proceedings were had: * * *

[Opening statements are omitted. They were made by: Mr. Stallings, and Mr. Blackwell.]

MRS. SPARKS' [PLAINTIFF'S] TESTIMONY

[pp. 25a-84a]

[23]*

MARY RUTH SPARKS, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Robert P. Hobson

MR. HOBSON: If Your Honor please, and in order to save time, and subject to counsel's agreement, I want to offer in evidence a pair of shoes worn by Mrs. Sparks at the time of the occurrence involved, a picture of the sewer cap—the manhole cover in question that may be marked Plaintiff's No. 2, a picture of the crosswalk in question, Plaintiff's Exhibit 3, a positive print of the X-ray of Mrs. Sparks' knee and knee cap, Plaintiff's Exhibit 4, and another positive print of the X-ray after the fracture had been reduced, Plaintiff's 5.

BY THE COURT: Is there any objection, gentlemen?

MR. BLACKWELL: Very well, Your Honor.

(Whereupon, documents were marked Plaintiff's Exhibit Nos. 1-5, respectively.)

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*In the Appendix to the Appellants' Brief there has never been any omission from the testimony of any witness.

Reference to the pages of the typewritten Transcript of Testimony where the testimony there appears, is made by the bracketed black-faced numbers in the center of this Appendix's pages.

BY THE COURT: All right. Without objection, these exhibits will be permitted in evidence and designated as indicated.

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MR. HOBSON: Now, Mrs. Sparks, will you speak out, please, and talk to this lady here?

MRS. SPARKS: I'll try.

Q. And if she hears you, everybody on the jury is bound to hear you. So, bear that in mind, will you please?

A. I'll try.

Q. The jury must hear what you say. You are Mrs. Mary Ruth Sparks?

A. Yes.

Q. Where do you live, Mrs. Sparks?

A. 698 Madeline Court.

Q. Now, this is not a very nice question, but how old are you?

A. Forty-six.

Q. Mrs. Sparks, on the day of this accident, will you tell the jury where you were going from and to?

A. I was going from my home to Bacon's.

Q. And why were you going to Bacon's?

A. I was employed there.

Q. In what capacity?

A. I was part time worker.

Q. And part time what kind of work?

[25]

A. Sales clerk.

Q. All right. And had you been employed there before?

A. Yes.

Q. For what period of time?

A. From the latter part of September of '53 until Christmas.

Q. And then in '54?

A. I'd been called back that day. I was going back to work that day, my first day of work.

Q. Now, how did you get to Fourth and Market?

A. By bus.

Q. And on which corner of the intersection did you get off of the bus?

A. I didn't hear you?

Q. On which corner did you get off the bus?

A. On the northeast.

Q. And what building or store is there, if you recall?

A. A watch shop.

Q. And after you got off of the bus at the northeast corner, how did you undertake to get over to Bacon's?

A. I was going back towards the southwest,

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Q. On the east or west side of the street?

A. On the east side.

Q. And tell the jury whether you were walking in or out of the crosswalk?

A. I was in the crosswalk.

Q. How frequently before that morning, Mrs. Sparks, had you walked across that intersection in that crosswalk?

A. Well, at least a hundred times or more.

Q. During those crossings in that crosswalk, had you ever at any time seen any obstruction or danger there?

A. Well, I hadn't particularly paid any attention to it.

Q. Well, had you—had you actually observed any?

A. No.

Q. Now, on the occasion of this accident will you tell the jury, please, as you crossed over the street whether there was much or little pedestrian travel in that east crosswalk?

A. Well, at—I don't know whether there was anyone—there was no one behind me. I can't say how many were in front of me. No one was behind me.

Q. And how is there—or was there at that time

[27]

pedestrian travel moving in that east crosswalk?

A. I don't believe I understand that.

Q. Well, did you walk with the light, or not?

A. I walked with the light.

Q. I mean by that, a traffic light?

A. Yes, I had the right of way.

Q. Yes. And what has been your observation with respect to whether that particular intersection and that east crosswalk is a much or little used intersection?

A. Well, it's much used.

Q. And on this occasion was there traffic moving across the intersection?

A. Not at the time I was crossing. It had stopped.

Q. But, do you mean there was no traffic moving east and west on Market?

A. That's right.

Q. But was there traffic moving north and south on Fourth Street?

A. Yes.

Q. And is it or not permissible for northbound traffic to turn right into Market?

A. Northbound traffic—

Q. (Interposing) On Fourth Street.

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A. Yes.

Q. Now, as you walked across the street, was it necessary for you to, and dod you, actually, or were you actually watching and observing the traffic that was approaching or was ready to start across or through or around that intersection?

A. I was.

Q. Will you tell the jury, please, what occurred at the time you were injured?

A. Well, I was walking across the street and my left

heel caught in one of the holes of that cap and threw me down.

Q. Yes. Had you seen that hole before that time?

A. No.

Q. Now, this left shoe, which has been marked as a part of Plaintiff's Exhibit 1, is that the shoe that you had on your left foot at the time of this occurrence?

A. Yes, sir.

Q. Now, directing your attention first to the heel of this shoe, let's tell the jury, if you will, please, what kind of shoe that it?

A. The make?

Q. Yes.

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A. It's a Peacock shoe.

Q. Is there anything unusual or special about the construction of the heel of this shoe?

A. Well, they are braced with a metal brace, those heels are, to keep them from breaking off.

Q. Yes. Now, before this injury occurred, was this heel scarred and marked as it is now?

A. No.

Q. What put those marks on there?

A. That manhole cover.

Q. Now, comparing the left heel with the right heel, are the two the same now?

A. No.

Q. And what is the difference in them?

A. Well, the left heel is scarred up.

Q. And the right heel is not?

A. No.

Q. Are those shoes today in the same condition that they were immediately after you were hurt?

A. Yes, sir.

Q. And have they been in your possession all the time?

A. Yes, sir.

[30]

Q. Your Honor, I'd like to exhibit these shoes to the jury.

(Whereupon, Plaintiff's Exhibit No. 1 was exhibited to the jury.)

Q. Mrs. Sparks, was it your right or your left knee that was injured?

A. My right knee.

Q. And how was it injured?

A. The knee cap was broken.

Q. Well, I mean, what broke it?

A. The fall.

Q. Were you able to get up?

A. I made an attempt to get up.

Q. Could you?

A. No.

Q. And how were you finally enabled to get away from there?

A. The traffic stopped, someone called the policeman, and they came to the call, and then they called an ambulance and sent me out to the hospital.

Q. Now, to what hospital were you taken?

A. St. Anthony's.

Q. And—and how long did you stay there?

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A. I was five weeks the first time.

Q. Now, I believe that you were injured on March the 8th, 1954?

A. Yes.

Q. And you were taken to St. Anthony's Hospital that day?

A. Yes.

Q. And who was your doctor?

A. Doctor Arthur Hurst.

Q. And did you have any other doctor?

A. Well, Doctor Strickler was called.

Q. Now, what did Doctor Strickler do for you?

A. He repaired my knee.

Q. And when you say he repaired your knee, so far as you know it, can you tell the jury what he did?

A. Well, he had to operate. He operated on the 10th of March.

Q. Now, when you say operate, I doubt very much if the jury knows that that entailed. As far as you know, what did this operation entail?

A. As far as I know, he laced the knee cap back together.

Q. Well, how did he get—that knee cap is not

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observable from the outside, is it?

A. I'd say he made an incision and fastened—

Q. (Interrupting) And from the time of this injury until the time that you left the hospital, will you tell the jury whether you suffered much or little pain.

A. I suffered constantly.

Q. And was it necessary to give you sedatives and opiates to relieve that pain?

A. All the time.

Q. Now, when you left the hospital, where did you go?

A. I went to my home and stayed four more weeks in a cast. Then I went back to St. Anthony's and had the cast removed.

Q. And that yould have been some nine weeks after—

A. (Interrupting) That was nine weeks I was in a cast.

Q. In a cast. And after the cast was removed, where did you go?

A. I went back to my home.

Q. Were you able then to be up and about?

A. No.

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Q. And from the time the cast was removed on up

until, say, in July, what was your condition with respect to whether you suffered?

A. I suffered.

Q. And were you enabled to sleep normally during that time?

A. No.

Q. One think I overlooked, I think, Mrs. Sparks. Will you tell the jury, please, whether during the time that you were in St. Anthony's Hospital you suffered any with your back?

A. Well, I suffered with my back, because in the fall I was twisted.

Q. And was that a mild or serious suffering?

A. Well, there were no broken bones.

Q. I mean, insofar as it affected you. Did it hurt much or little?

A. Oh, yes.

Q. Oh, yes; what?

A. It hurt me.

Q. Now, after you got that cast off and had it off for some weeks, was that knee all right?

A. No.

[34]

Q. And how did you yourself observe and know that it wasn't all right?

A. Well, I couldn't use it, couldn't walk. And the wires that were in the knee cap was coming up through the leg into the flesh, and I had to be returned to the hospital—

Q. (Interrupting) Now, let's stop right there just a moment, please. Did I understand you to say that the wires that had been used in the repair of the knee cap after a while began to come out through the flesh and the skin of your knee?

A. Yes, sir.

Q. Mrs. Sparks, I guess that wasn't a very pleasant

or comfortable experience, was it?

A. No.

Q. And what did you do then?

A. Doctor Stricker had me to go back to the hospital on the 20th of July. They made another incision on the 21st and removed those wires.

Q. And how long were you in the hospital then?

A. Eleven days.

Q. And then, I assume, you went home?

A. Yes.

[35]

Q. When you went home after that eleven-day stay in the hospital, could you get about normally?

A. No. I had to go on crutches.

Q. And how long were you on crutches after that, if you know?

A. Oh, at least until December.

Q. All of that was in '54?

A. Yes.

Q. From the 8th of March, 1954, until today, have you ever at any time been without pain and discomfort in that right leg and knee?

A. No.

Q. How does it affect you now?

A. Well, it pains me. I can't stand much weight on it. And in doing my work, it's a handicap. I can't bend it. I can't kneel down on it.

Q. I think I overlooked to ask you, Mrs. Sparks, are you required to do your own work?

A. I do my own work.

Q. And what about your ability to go up and down steps?

A. Well, it's difficult. More difficult to go down than it is up.

[36]

Q. And how about the stability of your right knee?

A. Well, it's weak.

Q. What effect does it have upon the stability of the knee after you have walked or used it to some extent?

A. Well, it isn't as good. I don't have a good use of it.

Q. Mrs. Sparks, do you have a statement of the expenses that you have incurred as a result of the injuries that you received on—

A. (Interrupting) Yes, I do.

Q. (Continuing) —on March the 8th?

A. Yes.

Q. Do you have that list with you?

A. Yes.

Q. Would you give it to the jury, please? Just read it, if you will, please, item by item?

A. (Reads) Doctor Strickler, $525.; Doctor Williams, $25.; Doctor Likins, $35.; Doctor Hurst, $264.; St. Anthony's Hospital, $831.50; Ambulance, $16.; Yellow Cab, $50.; Hired help, $125.; Drugs, $452.15; Loss of time from March the 8th, '54, to September the 12th of '54 at $17. a week will be $1343.

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Q. (To Defense Counsel) You may ask the witness.

Cross-examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Mrs. Sparks, do you live in an apartment or in a house?

MRS. SPARKS: In an apartment.

Q. How many are in the family with which you live?

A. In my immediate family, or how many families in the apartment?

Q. Your immediate family?

A. My husband and I.

Q. How long have you lived in that apartment?

A. Thirteen years.

Q. Your husband and yourself has constituted the mem-

bers of that immediate family living there, I believe, during that time?

A. What was it?

Q. Your husband and yourself living in that apartment have been the only members of your family living—

A. (Interrupting) No; I have a daughter. She's married.

Q. She's married. How long has she been married?

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A. Nine years.

Q. Where does she live?

A. In Morganfield, Kentucky.

Q. Now, without going over details, is there—is this a fair summary of your movements on the morning of March 8, 1954? You left your apartment and got a bus of the Louisville Transit Company and proceeded along Broadway from the west end of Louisville eastwardly to the Fourth and Broadway intersection?

A. Right.

Q. You got off of that bus there on the—at the bus stop on Broadway in front of the Heyburn Building—

A. (Interrupting) That's right.

Q. (Continuing) —the Heyburn Building corner? You then walked around to the bus stop on Fourth Street at the other—around the corner of the Heyburn Building—

A. (Interrupting) That's right.

A. (Continuing) —and took a bus on Fourth Street going north?

A. Yes.

Q. You traveled on that bus down across Market Street and a little ways north of Market Street on the east side of Fourth Street, I believe—

[39]

A. (Interrupting) Yes.

Q. (Continuing) —to the bus stop at that point?

A. Yes.

Q. You got off and then walked south on the sidewalk along the east line of Fourth Street until you came to the north line of Market Street—

A. (Interrupting) Yes.

Q. (Continuing) —and you intended to cross Market Street and go on over to Bacon's, which is on the east side of Fourth Street, one entrance on the east side of Fourth Street, a few feet beyond the Taylor Drug Store and another entrance, I believe, on Market Street?

A. That's right.

Q. The other entrance to the Bacon's store is east of the Taylor Drug Store on Market Street?

A. Yes.

Q. Which entrance did you intend to use in going into the Bacon's store?

A. The Market Street entrance.

(Off the record discussion between counsel.)

MR. BLACKWELL: Plaintiff's counsel wishes to withdraw this witness, Your Honor, to enable a physician to testify, and that's quite agreeable.

[40]

BY THE COURT: You may step down, Mrs. Sparks, and we'll call the Doctor.

DOCTOR ARTHUR HURST, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. S. J. Stallings

MR. STALLINGS: You are Doctor Arthur Hurst?

DOCTOR HURST: That is correct.

Q. Doctor, what school or schools are you a graduate in medicine?

A. I graduated from the University of Louisville

medical school.

Q. In what year?

A. 1925.

Q. And have you been practicing your profession since that time?

A. Yes, I have.

Q. And where do you maintain your office?

A. In the Brown Building.

Q. Do you specialize in any particular branch of

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medicine?

A. I specialize in diagnoses and internal medicine.

Q. Doctor, in your professional capacity did you have an occasion to see Mrs. Mary Ruth Sparks?

A. Yes, I have.

Q. Was she a patient of yours prior to the injury that she received in March of 1954?

A. Yes. She became a patient of mine on June the 26th, 1953, being referred by Doctor J. C. Ray.

Q. Now, Doctor, did you see her at St. Anthony's Hospital after she was injured?

A. I was there at the hospital at the time they brought her in and saw her immediately.

Q. Doctor, pick up now right at the time of the injury and tell us what you saw and what you observed and what treatment you gave her and how she responded and just what part you played in connection with her injuries?

A. Well, do you want me to say anything about her previous condition?

Q. Yes, you can.

A. Mrs. Sparks—when I first saw her, originally, was a very unhappy and rather ill woman. At that time she had

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toxic thyroid and she *unfortunarly* has many allergic factors to contend with and a tendency to anemia, and she's a

rather frail person with some psycosomatic problems, if you understand that new word. So, with Doctor Ray and my help she had made wonderful progress up to the time that she was injured. As a matter of fact, I was very happy about her situation. She had even gone back to work at that time. And when this happened, of course, it set back all that we had done before. She came to the hospital, and she had a separation of the patellar bone, the knee cap was separated quite widely. You could feel a space of about an inch and half between the two fragments. The knee was swollen and quite painful. She was in some condition of shock at that time. Doctor Strickler was called in to see her and to take care of the orthopedic problem, and I continued--or, I'm sorry—I thought you were going to ask me something—I continued to look after her from the medical standpoint, and she had a great deal of pain. Due to her many disabilities, and—she has a rather somewhat lower resistance for pain than the average person has and therefore she had a lot more discomfort than an average person would have and we had to give her a good many sedatives and narcotics to keep her comfortable. We had to put her on a special diet to take care of the many allergic foods that

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she had to contend with. We had to contend with anemia which she's prone to and to give her various medicines to control her allergic manifestations. She progressed very well in the hospital with all of the difficulties and was able to leave after a reasonable period of time, and went home and was cared for at home, then returned again to the hospital just for one day to have a cast removed, went back home, and returned later on 7-20-54 to have the wires that Doctor Strickler had placed in the knee cap removed. These were causing her a good bit of annoyance because the ends of the wire were sticking right up through the skin

and made the knee quite tender. The wires were removed successfully, and the wound healed satisfactorily. She was anemic and required two transfusions of blood at that time and left the hospital on the 30th of July. I did not see her again at my office until the 10th of August. Of course, during all this time we talked over the telephone any number of times. And I've forgotten to mention that in addition to the knee pathology she also had a considerable amount of pain in the lumbar spine which was diagnosed as a lumbar sprain. X-ray of her spine did not show any fracture. This pain in her back continued to improve as time went on, yet on August the 17th, '54, she came to my office with a sciatica of the left sciatic nerve, neuritis of

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the left sciatic nerve which we term sciatica, which in turn proceeded to go down to the spinal injury. This improved under treatment, and by October the 19th, '54, I made a note on my chart that was the first time she'd been able to walk with a cane alone. Previous to that time she had to use crutches. Her general condition was improving along with the patellar improvement, the knee cap improvement, and on March the 1st, 1955, I made a note then that she had more movement in her knee and was continuing to improve in a general way as well. The last time I—the last time I saw her was in September—on—yes, September the 2nd, of '55, this year, at which time I noted that the flexion of her knee had improved to the point where she had movement of about—to forty-five degrees. She was still quite uncomfortable in the knee, had occasional back pain, and was, I thought, getting along very satisfactory, considering all of her difficulties.

Q. Doctor, what is the situation with reference to the motion in her knee as of this day?

A. Well, I couldn't answer that because I haven't seen her since the 2nd of September. Based on that I would

say that it's probable the same as it was then, about a forty-five degree angle of motion in the knee.

Q. Well, is that good or bad?

[45]

A. Well, it's not good. I would say it's not bad. It's much better than I thought she would have originally. I've been very pleased with the way the knee has improved.

Q. Doctor, for your services did you render a bill?

A. Yes, sir.

Q. Do you recall what that was?

A. Yes, sir; I have a note here of it. The total bill from the time she entered the hospital up to the present time was $352. That constituted charges for laboratory work, forty-four hospital visits and thirteen office visits to date.

MR. BLACKWELL: Would you give me that figure again, Doctor?

A. Yes, sir; $352.

Q. Doctor, is that a reasonable charge for the service you rendered?

A. I believe so.

Q. (To Defense Counsel) You may ask him.

Cross-examination by Mr. R. Lee Blackwell

MR. BLACKWELL: When did Mrs. Sparks first become a patient of yours, Doctor—June 26—

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DOCTOR HURST: (Interrupting) 1953.

Q. (Continuing)—1953?

A. Yes, sir.

Q. And at that time she was suffering from a toxic thyroid condition?

A. That's right.

Q. Allergy?

A. That's right.

Q. Anemia?

A. That's correct.

Q. Any neurotic condition?

A. I guess you could say that there was some neuroses; yes, sir.

Q. Any other troubles?

A. Well, she had—among the allergies was a chronic sinusitis and chronic rhinopharyngitis which is a mixed affair not only of allergy but chronic infection.

Q. How frequently did you attend her between June 26, 1953, and March 8, 1954?

A. Fairly frequently. I can look it up in my chart here exactly how many times if you want the exact number.

Q. You might give—

A. (Interrupting) Anyway, at least once or twice

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a month.

Q. (Continuing)—a rough statement of it?

A. Once or twice a month at least.

Q. Now, I believe you said that the wires with which the patella, or knee cap, was repaired by Doctor Strickler later on had to be removed by him?

A. Yes, sir.

Q. What was the date of that—July 21st?

A. July the 21st, 1954; yes, sir.

Q. Is it or not frequently the case that such wires do have to be removed after the healing process has taken place?

A. Yes, sir.

Q. And they were removed successfully?

A. Yes, sir.

Q. And satisfactorily?

A. Yes, sir.

Q. And continuously since then Mrs. Sparks has made a rapid and good progress, measured by the standards that

you had originally thought?

A. Yes, sir.

Q. You have—have you had occasion to see her

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at all between March and September, 1955? You said you last saw her in September.

A. Yes, sir; I have seen her a number of times.

Q. Between March and September?

A. Altogether she was in my office thirteen times after her last hospital visit. The last hospital visit—in other words after July the 30th of '54 she was in my office thirteen times.

Q. That was not though for attention to her knee, I believe?

A. That was for her—partly that, partly her back, and probably—I think three times during that time there were associated conditions such as an ear infection—ear canal infection—and the sciatica that I mentioned, and a respiratory infection at one time.

Q Now, when did you, or Doctor Strickler, take Mrs. Sparks off crutches, following the injury?

A. That is something I cannot answer, because Doctor Strickler handled that. All I know is what the patient told me is when she did quit using crutches. I can give an approximate time.

Q. Would you state that, please?

A. Well, it must have been along about—around

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in September, 1954, I would imagine, because in—in October she mentioned that she'd finally got to the point where she could use a cane.

Q. In October '54 she was using a cane?

A. Yes, sir.

Q. And as far as you know she has not had to use any crutches since at least—at least October, 1954?

A. As far as I know, that's right.

Q. And the flexing of her knee is continuing to improve, or it was the last time you saw Mrs. Sparks this past September?

A. That is correct.

Q. That's all, Doctor.

(Witness excused.)

MR. STALLINGS: Now, could we take the police officer at this moment? It will only take about two or three minutes?

MR. BLACKWELL: Who is he?

MR. STALLINGS: Officer Hardin.

MR. BLACKWELL: All right.

BY THE COURT: All right, gentlemen. Let's proceed.

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OFFICER BRENT OVERSTREET HARDIN, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. S. J. Stallings

MR. STALLINGS: Would you please state your name?

MR. HARDIN: Brent Overstreet Hardin.

Q. You weren't named for a lawyer, were you?

A. No, sir.

Q. Officer, did you have occasion to make a call at Fourth and Market on March 8, 1954?

A. I did.

Q. How did you get that call?

A. We received it over the radio.

Q. Were you on foot or in a cruising car?

A. In a cruising car.

Q. What did you do when you got the call?

A. Well, we immediately turned on our siren when we got the call there was an injured woman at Fourth and Market. We turned on our siren and went to Fourth and Market.

Q. When you got there, Officer, what did you find?

A. Found the traffic stopped and quite a gathering

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of people and this lady laying in a crosswalk on her back.

Q. Did you talk to the lady there at the scene of the accident?

A. Yes, I did; just for a moment.

Q. Did she make any statement to you there?

A. Well, I first—

MR. BLACKWELL: (Interrupting) I don't know whether that is a competent question, Your Honor. I must object to it. I don't want to object too much.

BY THE COURT: Sustained.

Q. Where—what did you do and what was done there?

A. Well, first she was laying in the crosswalk and I thought that she'd been hit by a car. During our investigation I talked to her and found out no car was involved in it.

Q. Well, what else took place there at the scene of the accident?

A. Well, I—I asked her what happened to her to injure her, and she stated—

BY THE COURT: (Interrupting) Well, not what she stated, just what you did, Officer, and observed.

A. Well, I observed that she was in pain and

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injured, so we immediately called a wagon from our patrol garage, and we put her on a stretcher and covered her with a blanket and they taken her to the hospital.

Q. Well, do you recall seeing a cap like that (indicating) anyways near Mrs. Sparks there?

A. Well, there's quite a few of those caps around there.

Q. Well, was your attention called—not what anybody said—but was your attention called to a cap there?

A. Yes.

Q. Did you make any particular note of the cap?

A. No.

Q. Well,—now, don't tell what she said, but did she tell you anything about a cap? Yes or no. She either did or didn't.

A. She fell on a cap. She said she tripped on a cap.

Q. Now, not what she said, but did she say anything about a cap there?

A. Yes.

Q. All right. Now, don't tell what she said. That's all. (To Defense Counsel) You may ask him.

BY THE COURT: Any questions?

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Cross-examination by Mr. R. Lee Blackwell

MR. BLACKWELL: I believe that she was taken by you or some of the other officers to St. Anthony's Hospital?

A. Well, I don't know which hopsital she was taken to. We called a patrol wagon, and there was two other officers and of course all four of us put her on a stretcher and covered her with a blanket.

Q. You had nothing to do with taking her to the hospital other than putting her on the wagon?

A. No, sir.

Q. That's all, Officer. Thank you.

MR. STALLINGS: That's all. Thank you, Officer.

(Witness excused.)

(MRS. MARY RUTH SPARKS, recalled to the stand for additional cross-examination by Mr. R. Lee Blackwell.)

MR. BLACKWELL: Mrs. Sparks, I believe it was about 9:30 in the morning when you suffered this injury?

MRS. SPARKS: That's right.

Q. Was it a rainy morning or a bright-lit morning?

A. It wasn't raining.

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Q. Is it your best recollection that it was a bright-lit morning?

A. Yes.

Q. And, of course, at 9:30 in the morning on March 8th it was in daylight hours?

A. That's right.

Q. And you had crossed Market Street in this particular crosswalk previously at least one hundred times?

A. Yes.

Q. During the period from September until through Christmas, 1953, when you were working at J. Bacon & Son's store, did you travel back and forth from your residence to your place of employment over the same route that you had taken on the morning of March 8th coming to work?

A. Yes.

Q. Where did you normally have your lunch during that period of September through Christmas, 1954?

A. I took my lunch; ate it in the store.

Q. At least twice each day during that period from September through Christmas, 1954, you had crossed this same crosswalk where you fell there?

A. Yes.

Q. And I suppose that you crossed even more than

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twice a day on some days?

A. Well, I'd say twice a day, anyway, every day.

Q. And after our employment was terminated— (To the Reporter) Strike that, please. When did you quit work

for Bacon's in December, 1953?

A. The week just before Christmas. I didn't work Christmas week.

Q. Between that time and March 8th did you have occasion to visit, or go to, the Bacon store?

A. No. I had been out of town. My mother had been ill.

Q. Well, you were going to resume your employment on March 8th?

A. Yes. I'd been called back the week before. I was called back in February, and I was out of town.

Q. I see.

A. And then I had promised to come back on that day, March the 8th.

Q. Now, your eyesight is good?

A. Yes, sir.

Q. It has been good, and was good, on March 8, 1954, was it?

A. Yes, sir.

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Q. Had you ever observed that there were any manhole covers or metal covers or circular objects or facilities there in the street in that crosswalk before March 8th?

A. Well, not anything in particular.

Q. Well, had you ever noticed to—see them?

A. Well, I suppose I would normally just see them going by.

Q. It was a perfectly—the manhole in which your heel caught was perfectly visible to you, wasn't it?

A. Well, if I'd been looking right down at the walk, I guess I would have noticed it.

Q. Well, you could see it half-way across the street, or all the way across the street, couldn't you?

A. Yes, I could see it if I was looking for it.

Q. And it was perfectly visible to you—the holes in it

were perfectly visible to you?

A. No.

Q. As you got near to it, weren't they?

A. No.

Q. Can you see the holes in the manhole cover now?

A. Yes, looking right toward them, I can.

Q. You are setting from the witness—from the manhole cover that's here in the courtroom, a little more than

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four good steps made by a man who is of normal height, and you can still see the holes, can't you?

A. Yes.

Q. Therefore, those holes were visible to you the same distance away on March 8th, were they not, if you had been noticing them?

A. If I'd been looking for them.

Q. Now, you have lived in Louisville many years, haven't you?

A. Thirteen.

Q. You have had the experience many, many times of seeing grills in sidewalks, haven't you?

A. Yes.

Q. Where people walk, like cellar door grills or something? You may not have known what they were for, but large grills half as large as that map that's up there?

A. Yes, in the sidewalk.

Q. And they have openings between the bars in those grills, haven't they?

A. Yes.

Q. You have observed those many times?

A. Yes.

Q. You have observed the innumerable catch basins

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where you get off of a bus, generally, a little ways from the crosswalks, but they are near the guttering in the streets

and corners, haven't you?

A. Yes, sir.

Q. And there are openings in the grillwork in those catch basins, isn't there?

A. Yes.

Q. Do you know those?

A. Yes.

Q. Why do you know them, Mrs. Sparks?

A. Well, they are in places where you expect them to be, and if they are in the sidewalk you are looking for things like that.

Q. Do you know what—did you on March 8th know what a manhole was?

A. I did.

Q. Had you seen many of those round covers on manholes?

A. Yes.

Q. All over Louisville?

A. Yes.

Q. Down around your house?

A. Well, I don't know if there's any in the street

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around my house.

Q. Well, there are some down in the west end, aren't they?

A. Yes.

Q. You have seen them for many years?

A. Yes.

Q. You have observed they have holes in them, haven't you?

A. Yes.

Q. Was there any difference between those manholes that you may have observed in your vicinity down there and the manhole that you—where you fell here on March 8th?

A. Well, don't all of them have holes in them?

Q. Well, you had observed manholes with holes in them, hadn't you?

A. Yes, occasionally.

Q. Now, are you able to tell the jury where the manhole was located in which you caught your—in the cover of which you say you caught your heel on March 8, 1954? I believe you have seen this map, have you not?

A. Yes.

Q. Is it the manhole that is designated on the map by a circle with the figure 1 in it?

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A. Yes.

Q. And it appears in the portion of the map that has the pink color?

A. Yes.

MR. HOBSON: So that there may be no misunderstanding about it, Your Honor, I think that that map should not be designated as part of the record so we'll know for the record what the witness is talking about.

MR. BLACKWELL: May it be stipulated that the large map just referred to, which is on display before the jury, may now be introduced in evidence without further proof of its authenticity or accuracy in its representation of the objects shown on it in the vicinity of Fourth and Market Streets?

BY THE COURT: Any questions about it, gentlemen?

MR. HOBSON: None whatever.

MR. BLACKWELL: We had agreed about that.

BY THE COURT: Well, then you might—I don't think that has been designated or introduced in evidence.

MR. HOBSON: May it be considered as Defendant's Exhibit 1?

MR. BLACKWELL: Suppose we call it the

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Defendant's Trial Map?

BY THE COURT: I was referring now to the manhole cover.

MR. HOBSON: We're talking about the map.

BY THE COURT: Yes, I realize that.

MR. HOBSON: I didn't catch that.

BY THE COURT: But there's constant reference to the manhole cover. Is there any dispute about it, gentlemen?

MR. BLACKWELL: No, I believe not. May it be further stipulated that the manhole cover that has been before the jury here, since the jury was empaneled, also is introduced in evidence as an exhibit?

(Whereupon, articles were marked Defendant's Trial Map and Defendant's Exhibit No. 1, respectively.)

Q. Mrs. Sparks, I believe you do not know just which of the holes in this manhole cover your heel caught in?

A. No.

Q. You mentioned that there was some difference between the two—the heels on the two shoes which have been filed as Plaintiff's Exhibit Number 1, and what was that difference?

A. This suede's all roughed up.

Q. The left—the heel of the left shoe?

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A. Left shoe.

Q. Has some roughed up—

A. (Interrupting) That's right.

Q. (Continuing)—places that is not on the right?

A. That's right.

Q. It was your—the heel of the left shoe that you say caught that?

A. Yes.

Q. Do you know whether or not—do you of your own knowledge know whether or not your heel caught in one of those four holes that you can see there on the manhole cover?

A. I do.

Q. And I believe you said that the heel catching in one of those four holes that appear near the center, or around the central portion of the manhole cover, is what made you fall?

A. That's right.

Q. Mrs. Sparks, I wish to call your attention to the Plaintiff's Exhibit No. 3 which is a photograph of the vicinity of Fourth and Market Streets and would be glad if you would point out to me the manhole where you fell?

A. Right there (pointing).

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Q. May I make with a soft red pencil an arrow pointing toward the manhole that you have just pointed to?

A. For my benefit you can; with my permission.

Q. I have now made an arrow pointing to the manhole where you say you fell?

A. (Nods head affirmatively).

Q. Mrs. Sparks, how far away would you—would be your best estimate that you could see that manhole on a light, bright morning at 9:30 in the morning?

A. Well, I don't know.

Q. Half a square?

A. I doubt it.

Q. Across the street?

A. Well, maybe.

Q. You'd seen other manholes right in that vicinity, had you not, on previous occasions?

Mr. Hobson: Are you talking about manholes or caps?

Q. On previous occasions.

A. Who shall I answer?

Q. Had you on previous occasions—you had crossed this walk—walked across this same crosswalk and seen other manholes right there in that crosswalk?

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MR. HOBSON: If Your Honor please, is counsel talking about manholes or caps?

Q. Manhole covers?

A. Well, I suppose I'd seen them; yes.

Q. Including this particular one that's been introduced in evidence?

A. I can't say that particular one: no.

Q. What?

A. I can't say that I had any particular occasion to remember that one.

BY THE COURT: Any further questions of this witness?

Q. About when did you discontinue use of crutches?

A. Well, I tried—when I was in the house or with someone with me I would use a cane, about September or October probably.

Q. That's all. 1954?

A. Yes.

Q. That's all, Mrs. Sparks.

BY THE COURT: Call the next witness, please.

(Witness excused.)

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DOCTOR FRANK P. STRICKLER, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Robert P. Hobson

MR. HOBSON: You are Doctor Frank P. Strickler?

DOCTOR STRICKLER: I am.

Q. And you are a regularly licensed and practicing physician and surgeon in this city?

A. I am.

Q. And have been for how long, Doctor?

A. Since 1920, right after World War I.

Q. Doctor Strickler, on or about March the 8th, 1954, did you have occasion to see and treat Mrs. Mary Ruth Sparks at the St. Anthony Hospital in this city?

A. I did.

Q. Will you tell the jury, please, what her condition was when you first saw her?

A. She had a fracture of the right patellar, or right knee cap.

Q. Doctor, directing your attention to Plaintiff's Exhibit No. 4, which I assume to be a positive print of an

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X-ray, does that fairly and accurately represent the condition of the fractured knee cap of Mrs. Sparks?

A. It does.

Q. I'd like the jury to see that, Your Honor.

(Document handed to the jury by Mr. Hobson.)

Q. Now, Doctor, what was it necessary to do, and what did you do, in order to correct that condition?

A. We operated on her. We did what we call here an open reduction. We opened up—up the site of the fracture and cleaned out all of the clots and we sutured the patellar capsule together with No. 2 chormic catgut and put stainless steel sutures through and through around the patellar.

Q. Now, when you say stainless steel sutures, do you mean by that, wire?

A. That's a very thin, fine stainless steel wire.

Q. And was that operation conducted under an anesthetic or without an anesthetic?

A. Under general anesthetic, and followed by the application of a cast.

Q. Now, let's pass the cast for just a few moments.

I show you Plaintiff's Exhibit 5 and ask you whether that is a positive print of the X-ray of Mrs. Sparks' knee after the fracture had been reduced by the open operation that you have

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described?

A. That's right.

Q. I noticed that the letter 'L' is shown down here on the X-ray. That—is that a mistake? Should be 'R'?

A. That should be the right patellar.

Q. Yes. But this is the actual X-ray of Mrs.—

A. (Interrupting) Well, that could stand for a lateral.

Q. Yes. Now, Doctor, I observe in this X-ray what looks like scribbling just above the knee joint. What is that?

A. Well, that's the stainless steel wire. Stainless steel wire, of course, is opaque and casts a shadow, and these pictures, of course, are enlarged and the wire appears larger in this picture than it really is.

Q. Now, Doctor, after that fracture had been reduced and the wire had been put on there, I assume to hold it in place, what did you say—start to say—about the cast?

A. We put on a plaster-Paris cast.

Q. From where?

A. From the ankle up on the thigh to splint the fracture.

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Q. And how long was Mrs. Sparks confined to the hospital, the first time?

A. She was admitted on 3-8--54 and discharged on 4-13-54.

Q. And at the time she was discharged was she still wearing the cast?

A. Yes.

Q. During the time that she was in the hospital, Doctor,

will you tell the jury whether she suffered much or little pain?

A. Naturally, with a fracture of this type the—you have pain, you are bound to. And we gave her sedation to give her as much relief as possible.

Q. After she left the hospital with the cast on, was she required to return to the hospital for the removal of the cast?

A. Yes. We check these fractures about every three weeks with X-ray. That's the only way you can tell what's happening in the fracture is by X-ray, and when the X-ray shows that the fracture is solid, why, we take the cast off. This varies in different people. Some people grow bone rapidly, and others are what we call lazy bone growers. But on an average it takes about ten to twelve weeks for these

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fractures to become solid.

Q. Now, after the cast was removed, was it necessary for Mrs. Sparks to come back to the hospital the third time?

A. She came back to the hospital to have the wires removed, which we did—the wires were removed 7-21-54.

Q. And what was the occasion for the removal of the wires, Doctor?

A. Well, she thought that the wires were bothering her, and sometimes we leave these wires in and sometimes we take them out. It all depends on how people feel about it. *The* can be left in, but if they think they are bothering them, why, we take them out.

Q. And would you tell the jury how you took them out, or what was necessary?

A. Well, you have to re-open the incision, and you have to cut the wires and take a pair of heavy hemostats and pull them out.

Q. And how long was she confined to the hospital with that?

A. Well, I don't remember exactly how long. I think it was about a week or ten days, something like that.

Q. And during that experience, or that stay, in the hospital, did she suffer much or little pain?

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A. Yes. When you make an incision into the skin of that size, you are bound to have a little pain around it.

Q. Doctor, when was the last time you saw Mrs. Sparks professionally?

A. I saw her about six weeks ago, I think it was.

Q. And what did you find her condition to be at that time with respect to her knee?

A. Well, I think she's getting along about as well as these fractures do. Of course, when you have a fracture of the patellar there's always more or less some permanent disability, because a broken bone in this location is never as good as it was before it was broken. The patella is a sesamoid bone, and you don't get the same type of union in it that you get in a broken radius or broken femur. You get more or less a fibrous union. And I would say that she probably has anywhere from fifteen to twenty percent permanent disability. That's been—we never like to fix these disabilities under at least a year's time, because it takes approximately a year for a patient to recover from a thing of this type. I mean, recover function in the knee joint, because this—

Q. (Interrupting) Doctor—

A. (Continuing)—this fracture does involve

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the knee joint.

Q. Doctor, it's now been over eighteen months since this injury occurred, and is it with that in mind that you make your rating?

A. Yes. I say she has about a twenty percent permanent disability.

Q. (To Defense Counsel) You may ask the witness. Oh, I beg your pardon. (To the Witness) What—Doctor, what was your bill for the services you rendered, please, sir?

A. Three hundred fifty dollars.

Q. Is that a fair fee for the services that you rendered?

A. I think that's a standard fee for this type of operation.

MR. BLACKWELL: What was the amount of that, Doctor?

A. Three hundred fifty.

MR. BLACKWELL: Three hundred fifty?

A. Yes.

Q. Aren't you just giving us part of it, Doctor?

A. Well—

Q. (Interrupting) Didn't you have another one?

A. Well, there's another one for the written

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report. That was $25.

Q. No, I don't mean that. Didn't you have another bill for the second operation?

A Well, yes, I guess I did. But I don't have that with me.

Q. Well, now, isn't your $350 bill just for the first operation?

A. That's right.

Q. Would $175 be a fair charge for the second one?

A. I think so.

Q. (To Defense Counsel) You may ask the witness.

Cross-examination by Mr. R. Lee Blackwell

MR. BLACKWELL: I believe, Doctor, that it was nothing unusual in removing the wires after a patella has been repaired in the way you repaired this one?

A. Well, as I say, sometimes I leave the wires in and sometimes the patient thinks they are bothering them and we take them out. We leave that up to the patient. After all, they know how they feel better than anyone else does.

Q. She had—Mrs. Sparks has made a completely satisfactory progress in recovery from the fracture she had, has she not?

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A. As far as we can see. Yes, she's done all right. And as I told you these cases are fractures into the knee joint, and they usually end up with some permanent disability.

Q. The Plaintiff's Exhibit 5, which was shown to you, I now show to you, Mr. Hobson referred to what he described as scribbling in the upper part of that photograph. What are those lines that are shown there?

A. Well, as I told you before, they are stainless steel sutures.

Q. And with the enlargement—this is an enlarged—

A. (Interrupting) That's right.

Q. (Continuing) —photograph, is it not?

A. Yes, sir. We covered all that.

Q. And the stainless steel sutures are enlarged here about how much would you say?

A. I wouldn't have any idea. But they are larger, and I couldn't give you the exact figures.

Q. Approximately twice their normal size, or more?

A. Oh, yes; maybe more than that.

Q. As a matter of fact, the wires that are used as sutures in that kind of operation are just a little larger

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than a human hair, are they not?

A. Little bit larger than that.

Q. That's all, Doctor.

Redirect Examination by Mr. Robert P. Hobson

MR. HOBSON: They are still metal, though, aren't they, Doctor?

A. Yes, sir; they are metal. They are high-test, Number 19, we call it, stainless steel.

Q. Thank you, sir.

BY THE COURT: That's all, Doctor. Thank you.

(Witness excused.)

MRS. C. H. RINNE, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Robert P. Hobson

MR. HOBSON: You are Mrs. C. H. Rinne?

MRS. RINNE: Yes, sir.

Q. Now, Mrs. Rinne, it's mighty nice for you to

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nod your head, but the stenographer can't get that very easily.

A. I said, "yes, sir", but you didn't hear me.

Q. That's what I want you to do.

Q. You want me to speak louder?

Q. Yes, ma'am; if you will, please. Where do you live?

A. 667 South 35th.

Q. And do you know Mrs. Mary Ruth Sparks, the plaintiff in this case?

A. I do.

Q. How long have you known her?

A. I would say about thirteen years.

Q. And had you seen much or little of her since she was injured on March the 8th, 1954?

A. Yes, I do.

Q. Did you see much or little of her?

A. I see much of her.

Q. Did you go to see her in the hospital?

A. Yes, sir.

Q. Will you tell the jury just from your observation of her, in the hospital now, whether she was in much or little pain?

A. She was in much pain.

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Q. Now, after you came home, were you with her much or little?

A. I was with her much.

Q. And during that time did she suffer much or little?

MR. BLACKWELL: Your Honor, I think that perhaps he's asking for a conclusion. I would prefer that you rephrase your question, Mr. Hobson.

MR. HOBSON: I don't know how to state it otherwise.

MR. BLACKWELL: The witness can describe Mrs. Sparks.

MR. HOBSON: I've been doing that for thirty years.

MR. BLACKWELL: But she cannot state a conclusion.

BY THE COURT: I think a person of any experience can determine whether or not a person is displaying pain or is not displaying pain. I think since there is an objection that maybe Mrs. Rinne better tell exactly what she observed and why she gives that opinion.

A. Well, naturally, anyone going through an operation of that kind, it's very painful, and she suffered

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much pain.

Q. Well, now, what the Court had in mind, Mrs. Rinne, what was there that you yourself observed that indicated to you that Mrs. Sparks was suffering pain?

A. Indicated to me that she was suffering pain?

Q. Yes.

A. Well, it's natural that—well, I just don't know how to answer that, just don't know what you mean by that.

Q. Well, do you think I'm suffering pain now?

A. No, no. Why, she was in bed. She was in that cast. And it's natural that she was in pain. She wasn't feeling good. Anyone knows that. And she was in a cast.

Q. All right. Let's take it up in a few instances now. Could she get around?

A. Oh, no.

Q. Could she walk?

A. No.

Q. Could she help herself?

A. No.

Q. Could she work?

A. No.

Q. Now, after she got to the point where she could

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get out of bed, how did she get around?

A. Well, she was very uncomfortable. It always took two of them to help her out of bed—used her crutches.

Q. All right.

A. And she had to learn how to use those, of course.

Q. Now, how did she get around after she was able to get around without crutches? What was her next step?

A. Her cane.

Q. And did you see her using those crutches much or little?

A. Much.

Q. How did she get along with them? Nimbly, like an acrobat, or did she have trouble with them?

A. No; that was very hard for her.

Q. And how about the cane?

A. Well, the cane—at that time, of course, she was getting better, and the cane was a support for her. But

she could not go without a cane.

Q. (To Defense Counsel) You may ask the witness.

MR. BLACKWELL: No questions, I believe, MRS. Rinne.

(Witness excused.)

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MR. W. H. JAEGLE, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. Robert P. Hobson

MR. HOBSON: You are Mr. W. H. Jaegle?

MR. JAEGLE: That's right.

Q. Where do you live, Sir?

A. 1903 Lowell.

Q. And what is your business?

A. I am an engineer with the Gas & Electric Company.

Q. And when you say you are an engineer, what kind of engineer are you, sir?

A. Electrical engineer.

Q. And of what school are you a graduate?

A. University of Kentucky.

Q. Mr. Jaegle, what is your particular employment with the Louisville Gas & Electric Company?

A. Right now I am an engineer, electrical engineer, in connection with street lighting and various electrical distribution problems.

Q. And how long have you been employed by the Louisville Gas and Electric Company?

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A. Forty-three years.

Q. And during that time, say in the last ten to twelve years, what has been your assignment, or business?

A. I was superintendent of the Underground Department.

Q. And how long were you superintendent of the Underground Department?

A. About thirty years—thirty-eight or -nine years.

Q. Mr. Jaegle, in connection with the Underground Department of the Louisville Gas & Electric Company, during that period of time, and now, did it, and does it, maintain underground conduit lines and manholes with manhole covers?

A. That's right.

Q. In the city of Louisville?

A. That's right.

Q. Now, in your experience in dealing with manhole covers in the city have you observed the type of manhole covers that are in use in the city?

A. I have.

Q. Will you describe to the jury what those—what that type is; or if there is more than one type, what those types are?

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A. Well, there are two types. One is what we call a sidewalk type and one is a street type. That's a street type for heavy traffic. They all have some form of raised places in the casting to prevent slipping, and provisions, of course, for removing such manhole ring from the casting.

Q. Now, when you say 'that type', you are referring, I assume, to—

A. (Interrupting) Street type.

Q. (Continuing)—Defendant's Exhibit No. 1? That is what you were referring to?

A. That's right.

Q. And you say that's a street type?

A. Yes, sir.

Q. Now, Mr. Jaegle, I want you to tell the jury whether or not there are in common use, not only in this city, but elsewhere, manhole covers without holes in them such as

these four holes in Defendant's Exhibit No. 1?

A. Will you state that again, Mr. Hobson?

MR. HOBSON: (To the Reporter) Will you read that to him, please?

(Whereupon, Mr. Hobson's last question is read by the reporter.)

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A. The trend is toward that. We have manhole covers without holes, but we have one that we use for the hook so the man can pull the lid, so that he can get in the hole.

Q. Now, what—I'm coming to that, Mr. Jaegle. In recent years, has there been a trend in—particularly safety work to eliminate the holes in manhole covers?

A. That's true.

Q. And in your particular company what has been done in that respect?

A. Well, on our later construction all of our castings have no holes, more than one, which, as I say, is used for the man to pull the lid.

Q. And what do you do with reference to protecting that one hole?

A. Well, we put a rivet in there, cut off some of it so that it doesn't present a hazard.

Q. Do you mean by that, a firm rivet or a removable rivet?

A. A removable rivet.

Q. Now, what is the effect and overall principle with respect to the sealing of a manhole cover which has holes or does not have holes with respect to the escape of any gas

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that might be in the underground conduit?

A. (To the Reporter) Would you read that again?

(Whereupon, Mr. Hobson's last question is read by the reporter.)

A. That's a long sentence there, Mr. Hobson.

Q. Do you understand the question, Mr. Jaegle? I think I can state it a little better.

A. I don't believe I do.

Q. All right. Let me see if I can state it any better. If a manhole such—a manhole cover such as Defendant's Exhibit 1 was placed on a manhole and it did not have any holes in it such as these four holes that you see here—

A. (Interrupting) Yes, sir.

Q. (Continuing)—would that prevent the escape of gas from the underground conduit?

A. Not a hundred percent.

Q. And how would the gas get out?

A. Well, those—those lids don't fit perfectly.

Q. And not fitting perfectly, do they prevent the entry of water into the underground conduit?

A. Into the manhole; no, sir.

Q. And do they prevent the escape of gas from the manhole or underground conduit?

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A. Not a hundred percent, they do not.

Q. Now, what is the practice with respect to an underground conduit, or a manhole, with reference to the occasion when the lid must be taken off of the manhole and the men go down into the manhole and from that into the underground conduit with this respect?

A. Well—

Q. (Interrupitng) Is there any recognized practice that companies eugaged in that business do in order to rid the gas from that?

A. Well, when our men enter a manhole the first thing they do is test for the presence of gas. If it doesn't show any gas, then they go in the manhole. If it does show gas, it must be ventilated.

Q. And how is it ventilated?

A. Through fans.

Q. Is that what is known as blowing it out?

A. Yes, sir. We either blow it, or to suction it, either one.

Q. Yes. Mr. Jaegle, can you tell the jury what the purpose of those four grooves in this particular cover, or cap, is?

A. That is not our manhole, Mr. Hobson. I mean,

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that is not our type of cover.

Q. I understand that. But can you tell the jury what the purpose of those cut-ins is?

A. I would think they would be used for removing the lid.

Q. In other words, a hook, something like my finger, could be put under there and pull the lid up?

A. Yes, sir.

Q. The rivet that you described in covering up the one hole that the gas company leaves in its manholes, how long is that rivet?

A. Oh, I'd say the shank would be a couple of inches, two or three inches, long.

Q. And is it a round top or flat topped rivet?

A. Well, there are—they are round topped, but we square them off so that there's no chance for anybody stumbling on it.

Q. How many manhole covers would you say the Louisville Gas & Electric Company has in the city of Louisville?

A. I'd say over a thousand.

Q. Now, with respect to a crosswalk across the street, would the type of manhole cover to be used there be a sidewalk cover or a street cover?

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A. If it were in the street it would be a street type manhole cap.

Q. How long has the Louisville Gas & Electric Com-

pany been pursuing the practice of closing the holes in the manholes?

A. I'd say about ten to fifteen years.

Q. And has that been a general practice with them?

A. Yes, sir.

Q. Mr. Jaegle, tell the jury this, please, sir—I'm not sure whether you haven't already done it—with respect to manhole covers, you are familiar with such things generally in the city of Louisville, aren't you?

A. Yes, sir.

Q. And have been for many *h*ears? Now, I want you to tell the jury this, are there manhole covers to manholes generally in the city of Louisville which do not have any holes in them at all, such as these four holes that you observe in this Defendant's Exhibit 1?

A. We do not have any that are completely—

Q. (Interrupting) I'm not talking about Louisville Gas; I'm talking about generally?

A. I don't know of any that are completely sealed. They usually have one hole in order to remove the casting.

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Q. Do you mean a hole, or a lever that can be pulled up?

A. No, a hole like you see in the top of that—outer edge, because it requires less force to remove it with the holes in the edge than if you tried to remove it in the center.

Q. Yes, sir. What I'm speaking of, is this true or not, that some of these manhole covers have a little raisable and lowerable lever, something like that, into which a hook can be placed to lift the manhole, and otherwise there is no manhole at all?

A. I don't recall any, Mr. Hobson.

Q. Would it be consistent with your knowledge, or inconsistent with it, that of the seventeen manholes shown around this intersection that only two of them have holes

in them?

A. Will you state that question again, please?

MR. BLACKWELL: Let's identify the section you are speaking of.

Q. Directing your attention to Defendant's Trial Map, which shows among other things the intersection of Fourth and Market, the east crosswalk over Market Street being designated in pink, and manholes or manhole caps Nos. 1,

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2, 3 and 4 being at least partially in that crosswalk, and there being four other manholes and manhole covers within that area, that is, the cross walk and the intersection of Fourth and Market Streets, would it be consistent with your information, or surprising to you in any way, to know that of those eight manhole covers only two of them have holes in them?

A. I was surprised to know that.

Q. Thank you. (To Defense Counsel) You may ask the witness.

Cross-examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Mr. Jaegle, what is the difference between what you have described as a sidewalk type and the street type of manhole covers that the Louisville Gas and Electric Company use?

MR. JAEGLE: Mainly in the thickness of the metal.

Q. The only difference is difference in thickness?

A. To support the weights of trucks and so forth on the streets.

Q. And every manhole cover which the Louisville Gas and Electric Company has in Louisville has a hole in and through the top of the cover, hasn't it? at least one?

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A. I'd say that's true.

Q. Do you know of a single Louisville Gas and Elec-

tric Company manhole cover in Louisville that does not have at least one hole going clear through the manhole cover?

A. I couldn't answer that question positively. The—

Q. (Interrupting) Well,—

MR. HOBSON: (Interrupting) Let the witness answer.

A. The original design of one of our subsidiary companies was to remove the lid through the hole beveled like is on the side of that. That was impractical, so we had to put a hole in it.

Q. Would it be a safe estimate, and out of your long years' experience with the Louisville Gas and Electric Company and at least in dealing with its own manhole covers—I think you can answer this—to say that at least ninety-nine percent of all Louisville Gas and Electric manhole covers in Louisville have at least one hole clear through the cover?

A. Approximately that.

Q. And many of them have more than one hole, don't they?

A. Some of them do; yes, sir.

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Q. And in fact the number of Louisville Gas and Electric Company manholes with such covers on them in the streets and alleys and public ways of Louisville I believe is 1350, isn't that substantially correct?

A. I wouldn't know definitely how many.

Q. Does gas tend to gather in manholes and around conduits and ducts in which wires run under the street surfaces in Louisville?

A. Yes, sir.

Q. Does the accumulation of such gas produce a dangerous condition in a manhole?

A. It does.

Q. Is that—does that danger include danger of an explosion?

A. If you have the proper amount of air; yes, sir.

Q. That is, an explosive amount of air?

A. Yes, sir; that's right.

Q. And does it create a danger of severely poisoning a workman if he breathes it?

A. It will prove fatal.

Q. Now, doesn't a hole in a manhole cover allow, maybe not a hundred percent of gas to escape, but allow the escape of a considerable amount of gas that may have accumulated

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or may tend to accumulate in the manhole?

A. I think that's hard to say, because even with the manhole casting with the holes in it we still find gas.

Q. Well, that would be gas with a lower specific gravity than the atmosphere above, wouldn't it?

A. No, it would be—

Q. (Interrupting) I mean, heavier than the atmosphere above?

A. No, we usually find the gas at the top—right under the roof.

Q. Does the hole permit the escape of some gas?

A. I would think so, yes.

Q. And in permitting the escape of some it tends to prevent explosions that might otherwise occur?

A. That's possible, yes.

Q. Isn't it likely?

A. Well, it depends how much air—I mean, how many holes you have in that. If you didn't have very much, I doubt if there would be too much convection of gas in that.

Q. The more holes you have, the more it would tend to prevent explosions from gas accumulation, wouldn't it?

A. The more gas would be vented; that's right.

Q. And if you have only one hole, you are simply

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taking a greater risk of explosions?

A. That's right.

Q. If you have four holes, you are reducing the risk of explosions?

A. Somewhat, yes.

Q. And not only reducing the risk of explosions, but you are reducing the risk to the lives of workmen who may have occasion to go into those holes, aren't you?

A. Our men test regardless of ventilating qualities of the hole. That's an imperative rule of our company.

Q. What kind—what are the sources of gas which tend to accumulate in manholes and in conduits leading to manholes, Mr. Jaegle?

A. Well, there could be sewer gas. There could be leaks in the mains of the company, and there could be decomposition of a lot of matter that falls into these holes.

Q. That's organic matter?

A. Yes, sir.

Q. You mentioned that Louisville Gas and Electric Company is in the process of dropping rivets in holes in its manhole covers?

A. That's right.

Q. Did I understand you to say that?

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A. That's right.

Q. By the way, what is the size of the hole in the Louisville Gas and Electric manholes?

A. I wouldn't know exactly what the diameter of the hole is.

Q. It's more than an inch, isn't it? Isn't it about an inch and quarter?

A. About an inch, I'd say. Somewhere around there. I don't know. I haven't measured them.

Q. Is the process of dropping a rivet in the hole in the

cover one under your jurisdiction at Louisville Gas and Electric at the time?

A. It was; yes, sir.

Q. Mr. Jaegle, would you be so kind at the first recess of the court to go down here to the corner of this building, the Fourth—the Sixth and Broadway corner, and see if there is a manhole cover in the sidewalk, a Louisville Gas and Electric manhole cover in the sidewalk, that has a hole in it which this morning has a rivet in it? See if there is a Louisville Gas and Electric Company manhole cover just a little ways out in the—from the corner of this building at Sixth and Broadway corner, just a little bit out in the street that has a hole in it and this morning has a

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rivet in it, and then walk on out to Broadway—

MR. HOBSON: (Interrupting) To Broadway?

A. We're on Broadway.

Q. Walk on out Broadway to Fourth Street and see if there are any other Louisville Gas and Electric manhole covers in Broadway with a hole in them and rivets in them, and then determine and report back to the jury whether all of those rivets have been put in those manhole covers since last Saturday noon? Would you do that?

A. I wouldn't know that.

Q. Could you determine from your company's records whether those rivets have been put in there since last Saturday noon?

A. We never keep a record of every rivet we put in a manhole.

Q. Will you examine—I believe you said that those rivets originally had a round top, that you grind them off flat?

A. We did. That was our practice.

Q. Will you please examine the rivets in the Louisville Gas and Electric manhole covers I have just referred to

and report back to the jury whether or not those rivet tops appear to you to have been ground off just in the last three

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or possible four days and are still bright?

A. Those are the instructions. If they don't take them up and don't pull—

Q. (Interrupting) Well, will you examine the tops of those rivets and report back to us whether or not they are still bright?

A. You have seen them?

Q. Yes.

A. Well, it isn't necessary for me to look.

Q. Do those rivets often get out of the holes in the Louisville Gas and Electric covers?

A. Yes; we find people take them out quite frequently.

Q. Mr. Jaegle, I'd be most appreciative if you will examine the particular Louisville Gas and Electric manhole covers I have referred to—

A. (Interrupting) I'll be glad to.

Q. (Continuing)—and let us know about them after the next recess.

By the Court: Are there any further questions of this witness?

Mr. Hobson: None, Your Honor.

By the Court: Ladies and gentlemen of the

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jury, at this time we'll recess until two o'clock, and I again give you the usual admonition that you are not to discuss this case among yourselves, permit it to be discussed in your presence, or form any opinion until it has been finally submitted to you.

Mr. Crier, we'll recess court until two o'clock.

(Whereupon, at about the hour of 12:26 p.m. court was declared in recess until 2:00 p.m.)

Afternoon Session

BY THE COURT: All right. We are ready to proceed, gentlemen.

MR. STALLINGS: (To Mr. Blackwell) Did you want Mr. Jaegle?

MR. BLACKWELL: Has he arrived?

MR. STALLINGS: I see him here in the courtroom.

MR. BLACKWELL: All right, Mr. Jaegles.

(Whereupon, Mr. W. H. Jaegles returns to witness stand.)

MR. BLACKWELL: Mr. Jaegles, before the noon recess I asked you if you'd very kindly go down and look at

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Louisville Gas and Electric-owned or controlled manhole covers commencing in the sidewalk at the southeast corner of this Federal Building and extending along the same side —that is, the north side of Broadway—to Fourth Street, and in the street from—in Broadway, from Sixth over to Fourth Street and examine some manhole top covers. Have you made that examination?

A. Yes, sir.

Q. Let's take the sidewalk first. Did you find any Louisville Gas and Electric-owned or controlled manhole covers in the sidewalk along the north side of Broadway in that area?

A. Yes, sir.

Q. How many?

A. Oh, I didn't count them. They average about one per block. At Fourth Street there are two.

Q. That would be about four in the sidewalk?

A. Four or five, I'd say.

Q. And how many are in the street, out in Broadway?

A. Oh, I wouldn't know.

Q. Between Sixth and Fourth Streets?

A. There's one at each intersection there.

Q. I beg your pardon?

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A. About one at each intersection.

Q. That will be how many?

A. From here it would be about four or five.

Q. So there would be about nine in that area?

A. I'm talking about manholes. Now, in the sidewalk they are what we call service holes.

Q. Service holes?

A. Yes.

Q. Those service holes have a cover on them?

A. Yes. They are about the size of yours.

Q. About the same size as this Defendant's Exhibit No. 1 manhole cover that's involved in this case?

A. That's right.

Q. Did you find some rivets in one or more of those holes?

A. Yes, sir.

Q. In those eight or nine covers?

A. Yes, sir.

Q. Tell the jury whether or not those rivets had been—had had the rounded head of them ground down until they were more or less flat?

A. All that I saw were flat.

Q. And tell the jury whether or not generally

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they were still bright from the grinding process without having much rust on them?

A. Well, the ones that I saw were bright, I would say due to the vehicular traffic over the top of them.

Q. Could you fairly well determine whether they have been in there just for the last three or four days?

A. No, I couldn't tell.

Q. Would you be so kind—I believe the process of

putting rivets in the holes in the Louisville Gas and Electric covers is a matter under your supervision?

A. It was under my supervision.

Q. Would you be so kind as to ascertain when those rivets were put in and who put them in for the Louisville Gas and Electric?

A. At what occasion, the ones under question?

Q. I beg your pardon?

A. The ones under question?

Q. Yes, the ones under question?

A. We could try to find out, yes. But, as I told you, we keep no records of such small details as that.

Q. Well, would the—some of the workmen, thought who do such work as that know when those rivets were put in those holes?

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A. They probably might know.

Q. And would you let us have that information sometime in the next hour or so—

A. (Interrupting) Well, I'd have to—

Q. (Continuing) —after you have been at least temporarily excused here?

A. I'll try to see if I can get it in the next hour. These men are out on the job, and it will probably be a little difficult to get in touch with them.

Q. All right. Just as soon as you can.

MR. HOBSON: Just a moment. If Your Honor please, I think it's grossly unfair on Counsel's part to expect a witness to go back and dig up information which in the first place he says is not available and in the second place if Counsel wanted that information, as he assumes to do at this time, there was a perfectly proper way for him to get it, which he has not pursued, and I think it's an imposition on the witness.

BY THE COURT: Well, very obviously—and I'm sure Mr. Blackwell is also well aware that this witness has a perfect right to refuse to accede to your request in this regard, and the jury will not consider whether he does comply or not comply in any manner as having any bearing on any

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of the facts of this case. There is no compulsion upon this witness to accede to the request that has been made of him. He may or may not as he himself personally desires, and the jury is to draw no inference one way or the other from it.

MR. BLACKWELL: Your Honor, the witness is the witness introduced by the plaintiff in this case, and I am cross-examining him on a detail about which he's not now informed, but it's under his jurisdiction.

BY THE COURT: He says it's not under his jurisdiction, and he may or may not comply with your request.

Q. Well, I believe you are willing to get that information?

A. I stated that I am not now in charge of that department.

Q. Who is in charge of that department?

A. Mr. John Miller.

Q. Who?

A. Mr. John Miller is the superintendent of the Distribution Department at the Louisville Gas and Electric Company.

Q. How do you spell his name?

A. Spelling J-o-h-n M-i-l-l-e-r.

Q. (Spelling) M-i-l-l-e-r?

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A. Yes, sir.

Q. Thank you.

BY THE COURT: Any further questions?

Q. Yes. Mr. Jaegel, state whether or not during the past fifty years and continuing down to this time it has been a usual and commonplace practice here in Louisville for manhole covers to have holes through the top—through those covers?

A. In some companies—

Q. (Interrupting) General practice?

A. Some companies did and some did not.

Q. Well, generally, isn't it a fact that for the past fifty years, and down to—

A. (Interrupting) I wouldn't know back that far, Mr.—

Q. (Interrupting) —and down to and including this very day that while there may be some exceptions, generally the practice has been to have holes in the tops of manhole covers?

A. I think that is true; yes, sir.

Q. And isn't it a fact that Louisville Gas and Electric Company right today have many manhole covers in Louisville in which even these little rivets that you have

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mentioned have been dropped into a hole to cover up the hole?

A. There are to some extent.

MR. HOBSON: Mr. Jaegle, keep your voice up. It's hard for me to hear your answer.

MR. BLACKWELL: Read the answer, Mr. Stenographer.

BY THE COURT: He said there are some.

Q. So, whatever the trend, and I believe that was the word that Mr. Stallings used, whatever the trend may be, isn't it a fact that in Louisville today and for the past

nearly fifty years—let's say thirty years, the great majority of manhole covers in Louisville have had holes through the tops?

A. I'd say so. You say the great majority; that covers a lot of territory. At the beginning they did have the holes, but the trend definitely is not in that direction.

Q. But what—

A. (Interrupting) The trend definitely is not in that direction today.

Q. Well, by trend, do you mean that the trend in—are you using trend in a sense that the trend is to heat houses today with a furnace instead of a hot stove?

A. I wouldn't answer that question. I can't

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answer that.

Q. They are still used, though, with open holes in the top, aren't they?

A. That's right. They are there. And it would be too costly to replace them, probably.

Q. And those holes were put there for the purpose of ventilation and as a means for lifting the covers off?

A. That's right.

Q. I believe that's all, Mr. Jaegles.

Redirect Examination by Mr. Robert P. Hobson

MR. HOBSON: May I ask one question, Your Honor?

Mr. Jaegle, do you recall that immediately upon the adjournment of court you, Mr. Stallings and I walked right down here at the corner of Sixth and Broadway and there we found one of these manhole covers that had not only one, but twenty-one plugs in it? In other words, twenty-one holes had been plugged up. We stood there and counted them, is that right?

A. That's right.

Q. That's all, your Honor.

By the Court: All right. Next witness, please.

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Mr. Blackwell: One moment, Your Honor. (To Mr. Jaegle) Will you take the stand again?

Recross-examination by Mr. R. Lee Blackwell

Mr. Blackwell: Tell the jury, if you will, please, was that a Louisville Gas and Electric manhole?

A. That's right; yes.

Q. Tell the jury, if you will, please, why that manhole had been constructed with twenty-one holes in it?

A. I don't know. They was put in there before I came with the company.

Q. Well, you have had many years' experience with manhole covers for the Louisville Gas and Electric, haven't you?

A. That's right.

Q. Based upon the knowledge you have acquired in all those long years of experience, what in your knowledge was the purpose of those twenty-one holes in that one cover?

A. Well, they thought it would ventilate, or help to cool, the subway transformers that were in those holes.

Q. By the way, on that very question of cooling, Louisville Gas and Electric Company has many power cables under the streets here in downtown Louisville, doesn't it?

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A. That's true.

Q. Do those power cables generate heat?

A. Yes; that's true.

Q. And do holes in the covers of manholes serving those power cables tend to discharge that heat?

A. I wouldn't—I wouldn't think so, no, because the vast length of the cable is underground and it doesn't pass through the manhole.

Q. Well, you just said to us a few minutes ago that you think those twenty-one holes were put in that particular cover to ventilate and to—do what about heat?

A. Dissipate the heat of subway transformers.

Q. Do they dissipate heat?

A. We no longer have subway transformers in our manholes.

Q. They do tend to discharge any heat that might accumulate, do they not?

A. Some, I would say. Through ordinary air convection, yes.

Q. That's all, Mr. Jaegle. Thank you. I'm sorry to have called you back.

MR. HOBSON: May the witness be excused, Your Honor?

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BY THE COURT: No objection? Yes, he may.

(Witness excused.)

MRS. JOHN FISHER, called as a witness on behalf of the plaintiff, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. S. J. Stallings

MR. STALLINGS: You are Mrs. John Fisher?

MRS. FISHER: That's right.

Q. Where do you live?

A. 698 Madeline Court.

Q. Do you know the plaintiff, Mrs. Sparks?

A. I do.

Q. How long have you known her?

A. Oh, two and half or three years.

Q. Do you live in the same building with her?

A. I do.

Q. From the time of her injury in March of '54 did you have an occasion to see her much or little?

A. Very much.

Q. Well, how often, would you say?

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A. Twice a day—once a day. Twice a day most of the time. Sometimes more than that.

Q. Did you visit her in the hospital?

A. I only visited her one time.

Q. Well, after she came home, did you have an opportunity to observe her and determine in your mind as to whether or not she was suffering?

A. I did.

Q. Can you tell us whether she was suffering?

A. Yes; I'd say she was.

Q. Tell us how you determined that?

A. Well, the expressions on her face, when you'd go in to see her, the way she looked, the way she acted, the way she would move about in the bed, which she couldn't do.

Q. Well, from that observation and from those expressions, could you determine whether she suffered much or little?

A. I would say she suffered very much.

Q. (To Defense Counsel) You may ask her.

MR. BLACKWELL: No questions.

MR. HOBSON: That's the case for the plaintiff, Your Honor.

(Witness excused.)

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BY THE COURT: All right.

(The following proceedings were had at the bench out of hearing of the jury.)

MR. BLACKWELL: The defendant at this time moves the Court to direct a verdict for the defendant on the ground that there is no evidence of negligence on the

part of the Western Union Telegraph Company, and further that the plaintiff knew and admitted that this place was perfectly visible to her and she failed to exercise care for her own safety.

BY THE COURT: Do you want to argue this?

MR. BLACKWELL: Well, I'm prepared to argue that, anyway Your Honor would prefer. If he would prefer to hear the whole case, which, I think will take until tomorrow—

BY THE COURT: (Interrupting) Ladies and gentlemen of the jury, at this time we'll take a short recess, and again I give you the admonition not to consider this case, form any opinion, or discuss it among yourselves until it has been finally submitted to you. Mr. Crier, recess court for fifteen minutes.

(Whereupon, a short recess was taken, and after hearing arguments in chambers the Court overruled defendant's motion for directed verdict.)

WESTERN UNION'S [DEFENDANT'S] TESTIMONY

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MR. H. T. MEINERS, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Your Honor, we have agreed upon a stipulation. I shall state it and see if it is in accord with the agreement which I have discussed with opposing counsel.

It is stipulated that the ordinance adopted by the General Council of the City of Louisville and approved June 18, 1906, with reference to underground wires, as contained in the Seventh Biennial Compilation of the General Ordinances of the City of Louisville of 1907, appearing at pages, commencing on 832—

MR. HOBSON: Your Honor, may we not just agree that the ordinance may be considered read and considered by Your Honor as in effect without all this fanfare?

MR. BLACKWELL: I'll be through in a moment.—and continuing through a little more than the middle of the page of 846 may be considered read in evidence, and that such ordinance remained in continuous effect from the date of its approval without change or amendment until approval about

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July 27, 1955, of Ordinance No. 239, Series 955, which slightly changed the definition of District A referred to in the 1906 ordinance in respect to the territory of a territory that's not directly involved in this suit.

Have I correctly stated that?

MR. HOBSON: Yes, sir.

MR. STALLINGS: That's all right.

(Whereupon, the above mentioned ordinance is copied as follows:)

UNDERGROUND WIRES.

AN ORDINANCE concerning telegraph, telephone and electric light and power wires in the city of Louisville.

WHEREAS, Great danger to human life and property is occasioned by the large number of telegraph, telephone and electric light and power wires which have been erected and are trained, maintained and operated on, over and along the public ways of the city of Louisville; and

WHEREAS, The existence of such wires interferes with the necessary approach to the buildings on said public ways for other purposes, and incommodes the public use of the streets and alleys where such wires are located; and,

WHEREAS, Certain of the telegraph, telephone and electric and power companies now operating their lines within

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the city of Louisville obtained the privilege to erect poles and train, operate and mantain their wires on, over and along the public ways of the city upon the condition and agreement that they would remove such wires and poles, and place their wires under ground when required or directed to do so by ordinance of the General Council; and,

WHEREAS, The maintenance of telegraph, telephone and electric light and power poles and wires upon and along the public ways of the city mars the beauty of such public ways, and it has become entirely feasible and practicable to train and operate electric wires, both low and high tension systems, under ground:

Now, therefore, in the exercise of the police powers vested in the city of Louisville,

Be it ordained by the General Council of the city of Louisville:

1. That for the purpose of this ordinance as hereinafter provided, a district in the city of Louisville is hereby defined and shall hereafter be known and referred to as "District A."

The said District A shall be bounded as follows: On the north by the north line of Main street; on the east by the west line of Floyd Street; on the south by the south line

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of Broadway street, except between Second and Fifth streets by the south line of York street; on the west by the East line of Eighth street.

No telegraph, telephone or electric light or power poles, wires, tubes or cables or other wires shall be hereafter placed above the surface of any street, alley or public place in that portion of the city of Louisville embraced with the boundaries of said District A, except the following, to-wit:

(1) Conductors placed inside of posts or brackets used in connecting lamps and signal boxes on streets with underground conductors.

(2) Overhead trolley wires and wires and poles used by street railway or railroad companies, supporting said trolley wires.

(3) Wires, cables, tubes and other electrical conductors as may be necessary for local distribution within the boundary of each city block within said District A, but not upon, across, over or above the surface of the streets surrounding the blocks of and in said District A may be maintained overhead within the confines of each of said blocks in said District A, but by such means and in the manner as the Board of Public Works shall direct, and under the supervision,

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rules and regulations of said Board of Public Works.

Low potential signaling wires may be trained overhead across streets, in the discretion of the Board of Public Works.

(4) Such temporary poles, wires and appliances as may be necessary to keep in repair and maintain or extend and make connections with the lines now owned and operated by telegraph, telephone, electric light and power companies, until such time as by the provisions of this ordinance such lines are required to be placed under ground within District A.

2. That all conductors, poles, wires, cables and other *appurtances* along or across any street, alley or public

place in District A of the city, described in Section 1 of this ordinance, except

(a) Overhead trolley wires used by street railway or railroad companies and supporting wires and poles for the same.

(b) Conductors placed inside of posts or brakets used in connecting lamps and signal boxes on streets with underground conductors.

(c) Poles, wires, cables, tubes and other electrical conductors as may be necessary for local distribution, as

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provided in Sub-sec. 3, Section one herein.

Shall, prior to December 31, 1910, be removed, and all wires, ducts, tubes, cables and other *appurtances* necessary for the distribution of electricity for telegraph or telephone service, or for light or power service, or for any other purpose in said District A, except as heretofore provided, shall be placed and maintained under ground. All poles, wires, cables, tubes or other *appurtances* except as heretofore provided, remaining above ground in said District A after December 31, 1910, shall be deemed as unlawful obstructions to, and encroachments upon, the public ways of the city, and, as such, the Board of Public Works shall remove or cause the same to be removed at the cost and expense of the owner or owners thereof.

3. That any person or corporation which is now duly authorized by law, ~~or which~~ hereafter may be thus authorized to operate wires, tubes or cables conducting, transmitting or employing electricity, including telegraph or telephone service, or for any other purpose, along, over or across any streets, alleys or public places of the city of Louisville, desiring to place said wires, tubes or cables under the surface of any of the streets, alleys or public places in the city, is hereby authorized, after the passage

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of this ordinance, to construct underground conduits and to place and operate wires, tubes or cables under ground to the extent to which it is so duly authorized to use such streets, alleys or public places—but such company must apply for and receive from the Board of Public Works a permit to construct such conduits, ducts, manholes and other *appurtances* as may be required for placing said wires, tubes or cables under ground; which application shall be accompanied by full general and detail specifications and plans showing the route, capacity and dimensions of said conduits, ducts, manholes and other *appurtances*.

4. That the Board of Public Works is hereby authorized and directed upon receipt of an application made as provided in Section 3 of this ordinance, which application for placing existing overhead wires under ground must be made within five (5) months after the passage of this ordinance to promptly consider the matter of constructing conduits, ducts, manholes and other *appurtances* in the streets, alleys and public places within said District A named in said application. The Board of Public Works shall consider all applications, statements, plans and details presented and examine into the space available for conduits or ducts under the streets, alleys and public places applied for, and shall decide upon and approve

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such plans, specifications, materials and details for construction of such conduits, ducts, manholes, and provide such conditions as in its opinion the public interests and needs of the applicant seem to demand, and shall include in the plans one duct in each trench, and reserve the privilege of use of manholes and *appurtances* for use of the city as it may require for its police and fire alarm circuits and telephone service or other services that the city may require

or designate. Such ducts, manholes and *appurtances* in connection therewith shall be constructed and maintained by the parties receiving the permit, and to be used by the city free of charge or cost of any kind.

5. That all persons and corporations required by the provisions of this ordinance to place their wires under ground are required to begin the work of constructing said conduit system within one hundred and twenty (120) days after receiving a permit from the Board of Public Works, as provided in Section 3, and to complete the work of putting said wires under ground and of removing all poles, overhead wires, *appurtances*, etc., from all streets, alleys and public places in District A on or before December 31, 1910, so that no poles, wires, cables, conductors or *appurtances* shall remain above ground upon any of the streets, alleys or public places

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in said District A after December 31, 1910, except as provided in Section one, Sub-sections one, two and three and Section 2, Sub-sections a, b and c of this ordinance.

6. That any person or corporation desiring to make an excavation in an improved public street, alley or highway for any purpose mentioned in this ordinance, shall apply to the Board of Public Works for a permit, which permit shall only be issued after the applicant has deposited with the city of Louisville the sum of twenty-five dollars ($25.00) for each seventy-five (75) feet of trench, or fractional part of seventy-five (75) feet to be excavated, as a special fund to be used by the Board of Public Works as hereinafter provided, or after bond in the like amount has been executed in such form and with such sureties as the Board of Public Works may approve, which shall be renewed from time to time as said board may direct. In making excavations in improved streets, alleys or highways and in re-filling all trenches made in streets, alleys or highways, all work shall

be done as directed by the Board of Public Works and shall be maintained for a period of twelve (12) months after the completion thereof to the satisfaction of the Board of Public Works. Whenever any of the aforesaid work is not done strictly in compliance with the rules and regulations prescribed by the Board of Public

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Works, or is not properly maintained for a period of twelve (12) months after the completion thereof, then the said Board shall cause all such work to be done and the cost thereof shall be charged against the person or corporation in default. Whenever the whole or part of said deposit as provided in Section 6 shall have been expended for the purposes herein described, or there is a charge against the bond therein provided, no new permit for the excavation shall be issued to the person or corporation in whose deposit there is a deficit or against whose bond there is a charge until the fund is brought up again by the further deposit with the City Treasurer in the sum of twenty-five dollars ($25.00) for each seventy-five (75) feet of trench, or fractional part of seventy-five (75) feet excavated, or additional bond given. Whenever a person or corporation who has a deposit with the City Treasurer for the purpose of taking out permits for excavations under this section, desires to withdraw the said deposit, he shall notify the Board of Public Works, who thereupon shall certify to the City Treasurer the amount of the unexpended balance of said deposit, and the City Treasurer shall pay to said person or corporation holding said certificate the amount of such unexpended balance of said deposit as shown by such certificate, and take a

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receipt in full thereof, provided that all excavations previously made by such person or corporation have been refilled and all pavements repaired to the satisfaction of the

Board of Public Works, and have been maintained in good order for at least twelve (12) months after completion of such work; and likewise the amount of the bond provided in this section and in Section 11 may in like manner be reduced or nullified with the consent of the Board of Public Works. The Board of Public Works is hereby empowered, upon the granting of a permit, to name an Inspector who shall be paid by the party or parties receiving such permit, until all the works of the main conduits and lateral system as contemplated in said permit has been completed, and whose duty it shall be to continually inspect and oversee such work, and to report to said Board any violation of any of the provisions of this ordinance, or any of the rules or regulations prescribed by said Board.

7. All wires, conduits, pipes, ducts and *appurtances* required by this ordinance to be placed under ground shall be placed at such depth that the top of any part of the ducts thereof shall not be less than two (2) feet below the surface of the street, avenue, alley or public place wherein they are located, and shall be so located and constructed as not to interfere with or disturb existing surface of underground

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structures, conduits, pipes or other property belonging to other corporations, companies or persons, or sewers or sewer connections. All conduits shall be provided with ducts at least fifty per cent in excess of those required to carry the wires in use along the route of the proposed conduits at the time of making application for a permit to construct same. Nothing contained herein shall preclude the city from prosecuting or authorizing any public work of any character, but in the prosecution of any public work of any character hereafter the Board of Public Works shall have the power, if it deem the same necessary, to require the temporary removal of any wire, pipe, conduit or appliance authorized by this ordinance to be laid, and the

same shall be removed or necessary changes made therein by the owner thereof so as to conform to any reasonable requirement of said Board, and in case of failure on the part of any person or corporation to comply with any such order or requirement, then the said Board may make such removal or change, and the necessary cost thereof, shall be paid by said person or corporation to the City Treasurer upon proper demand being made therefor.

8. The Board of Public Works shall grant permission to any person or corporation to connect drainage system from conduits and manholes to the city sewer system when it is

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considered desirable and practicable. If not practicable the Board of Public Works may, if it thinks that it is advisable, allow such persons or corporations owning conduits to construct and maintain necessary drains to run under the street to some point where drainage can be obtained.

9. All the expense connected with the removal of poles, wires and other appurtenances and the making good of damages to any person or property in so doing shall be borne by the parties obtaining permits under this ordinance, respectively. When poles are removed from public streets, thoroughfares or alleys, all holes shall be filled up and the sidewalks and pavements placed in good condition similar to the surrounding sidewalk or pavement in a manner satisfactory to the Board of Public Works.

10. All persons and corporations owning conduits shall obtain from the Board of Public Works permits for each individual connection with the main conduit system along said route of said system. Written permission shall first be obtained from the owner of the property to make such excavation as necessary to do the work on his premises, and a copy of this permit shall be presented to the Board

of Public Works for their approval, and, after approval, they shall issue permit to open street and do necessary work therein for said

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lateral conduits. Such part of any lateral or individual connection as shall be constructed in any street, alley or other public place shall be constructed at the sole expense of the party or corporation owning the main conduit.

11. The Board of Public Works is hereby authorized and directed to grant permits to construct, alter and repair conduits, ducts, manholes and other *appurtances* under the surface of any street, alley or public place within the city, and to string wires, tubes and cables therein, under the terms and in accordance with the provisions of this ordinance to any person or corporation having the lawful authority, and to the extent which he or it may have to use the streets alleys or public ways of the city for furnishing or using electricity for public use, including telegraph or telephone service, on compliance by such person or corporation with the terms and conditions of this ordinance; provided such person or corporation has theretofore acquired, or hereafter may acquire, the right to use such streets, alleys or public places for such purposes, and further provided that such person or corporation shall file with the City Treasurer a penal bond in the sum of fifteen thousand dollars ($15,000.00), with good and sufficient surety or sureties, approved by the Board of Public Works, conditioned that such conduits, ducts, manholes

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and other *appurtances* shall be constructed in strict accordance with the plans and specifications approved by the Board of Public Works, and that the city shall be held harmless from all suits for damages which may arise from the construction of said conduits, ducts, manholes and other

appurtances; and conditioned further, that such person or corporation shall faithfully comply with all the terms of this ordinance concerning conduits, ducts and other *appurtances* and underground wires. Such bond shall be renewed from time to time whenever the Board of Public Works may so order, as the condition for the continued use of the conduit privileges obtained under this ordinance, and any refusal to renew a bond when so ordered shall forfeit all the rights hereunder.

12. That whenever the plans as approved by the Board of Public Works require two or more applicants for conduits to use a common trench or space for conduits in any portion of any street, alley or other place, then all such applicants shall carry on work of construction at such points as nearly at the same time as may be directed by said Board so as to disturb the street, alley or other public place at such point to the least degree possible; and any applicant refusing or failing, without an excuse satisfactory to the Board of Public Works, to carry on his or its work

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of construction at such point at the time and in the manner directed by said Board shall be deemed to have waived any right to such trench or space or conduit embraced in his or its application.

13. That whenever the plans, as approved by the Board of Public Works, require construction by two or more applicants for conduits on the same street, alley or public place, then the Board of Public Works shall direct the manner of constructing conduits as relative to time when the various parties or corporations shall proceed with the work, and if conduits of separate parties or corporations be adjacent to each other, then one conduit shall be first completed and proper time allowed for thorough setting of concrete around its ducts before trench is dug for adjacent conduit of other party or corporation.

14. That any permit granted under this ordinance shall become void unless the work therein authorized is begun within one hundred and twenty (120) days after such permit is issued, and proceeded with continuously and in good faith to completion within a reasonable time thereafter.

15. That wires of low tension and wires of high tension shall occupy conduits on opposite sides of all streets and alleys whenever practicable, and all electric

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light and power wires shall be deemed of high tension and all other wires shall be deemed of low tension.

16. That every person or corporation making application to place its wires under ground, as provided in this ordinance, shall give to the city of Louisville the right to use such poles as may be erected for local distribution or street lights in any part of District A, whenever the city shall require the same, for the use of the Fire Alarm, Police or Telephone systems of the city, or other city uses, to the extent such use is necessary for such purposes, but such use shall not exclude control and use of said poles by said company for its own purposes.

17. Plans showing all details of conduit construction and the disposition of all electrical conductors and apparatus within or connected with the conduits shall be filed with the Board of Public Works promptly on the execution of any work, so that a complete record of all conduits with their *appurtances* and under ground connections, together with the electrical conductors and apparatus installed in connection therewith, shall at all times be on file with the said Board of Public Works.

18. That it shall be the duty of the police force of the city of Louisville to assist in the enforcement of

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this ordinance, and to arrest and prosecute any person vio-

lating any of the provisions of this ordinance, or interfering with any wire, cable or conduit, or disturbing any cover or lid or manhole or service box for electric wires of any kind, without the proper badge of authority as provided herein.

19. That any person or corporation who shall interfere with a wire, cable or conduit or remove the cover or lid of any manhole or service box for electric or other wires, without having a numbered badge of authority or having actual authority, shall be deemed guilty of a misdemeanor and punished as hereinafter provided.

20. That all persons or corporations having underground conduits shall register with the Board of Public Works the employees whom they wish to be recognized as authorized to open manholes and service boxes for the purpose of making repairs or inspection, and the registration shall be kept by the Board of Public Works, which shall, in its discretion, issue numbered badges of authority upon the written request and at the expense of the company employing the person so registered, subject to such rules and regulations as said Board may prescribe. The said badge shall be authority for six (6) months, or until the name of such person is withdrawn

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from said registration by the corporation or person having registered it, unless sooner revoked by said Board.

21. That it shall be the duty of every person and corporation to take necessary precautions and see that every open manhole or service box opened by his or its authority is guarded and a red flag signal is displayed by day and a red light signal displayed by night at such opening until the cover is properly restored. Any person or corporation or employee thereof who shall fail to observe all or any of the requirements of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be subject to a fine as hereinafter provided.

22. That the Board of Public Works is hereby authorized to issue permits to persons or corporations applying therefor, allowing such applicant to erect and maintain above ground in District A, subject to the rules, regulations and supervision of said Board, such temporary poles, wires, or other *appurtances* for telegraph, telephone or electric light or power uses as may appear to said Board to be necessary on special occasions; provided, however, that each applicant for a permit under this section shall execute bond satisfactory to the Board of Public Works that all poles, wires and other *appurtances* erected under such permit will be erected and

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maintained strictly under the directions of said Board and removed by said applicant within ten days from the expiration of said permit; and further provided that said Board of Public Works shall not have authority to issue any permit for a term of more than thirty (30) days, nor to renew any permit for the purpose of extending such term. Any person or corporation receiving such permit who shall violate any rule or regulation of said Board shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be subject to a fine as hereinafter provided.

23. That after the passage of this ordinance the Board of Public Works shall not issue to any authorized applicant permission to occupy any special space, or begin work in connection with their application in any part of District A within five (5) months from date of the passage of this ordinance, which will allow all authorized applicants time to submit their plans and the Board an opportunity to consider the total demand for space from all authorized applicants.

24. That any person or corporation who shall violate any provision of this ordinance shall be deemed guilty of

a misdemeanor, and, upon conviction thereof, shall be fined not less than ten dollars ($10.00) nor more than one hundred dollars $(100.00) for each offense, and each day said violation

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continues shall constitute a separate offense.

25. That the city of Louisville reserves to itself all rights and powers which are now and may hereafter be vested in its General Council, Board of Public Works or other officers concerning the control and the regulation of the use of its streets, avenues, alleys, highways and other public places to prevent encumbering the same, to regulate and protect all future uses of same, and does reserve to the fullest extent the right and power to exercise any and all of its police powers at any time, and nothing contained herein shall be construed to in any wise abridge, prevent or waive any of such powers, nor shall any exception herein be construed to prevent or abridge further regulation and control.

26. That it is expressly ordained and provided that no person, firm or corporation shall, by reason of compliance with this ordinance, acquire any rights or privileges other or further than herein specifically expressed, and nothing herein contained shall be construed as extending or changing the terms, length of time, or any of the conditions of any contract or agreement now existing between the city of Louisville and any person, firm or corporation.

27. That all ordinances, or parts of ordinances, in conflict herewith shall be, and they are hereby repealed.

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28. That this ordinance shall take effect from its passage.

Approved June 18, 1906.

MR. BLACKWELL: I wish at this time to read just a portion of the ordinance of 1906 which I referred to.

BY THE COURT: Mr. Blackwell, you are familiar already with the ordinance. Could you just state it more quickly just in general terms?

MR. BLACKWELL: All right. The ordinance defines District A referred to in it as bounded on the north by the north line of Main Street, on the east by the west line of Floyd Street, on the south by the south line of Broadway, except between Second and Fifth Streets by the south line of York Street, and on the west by the east line of Eighth street.

The ordinance then provides that no telegraph, telephone or electric light or power poles, wires, tubes or cables or other wires shall be hereafter placed above the surface of any street, alley or public place in that portion of the city of Louisville embraced within the boundaries of said District A, with certain exceptions concerning wires going up to traffic lights and the like which, I believe,

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everyone agrees is not involved here?

MR. HOBSON: Did they have traffic lights in 1906?

MR. BLACKWELL: 1906.

MR. HOBSON: Thank you.

MR. BLACKWELL: Anyway, any such wires and cables and so forth that then existed above the surface of the streets shall be removed and be placed and maintained under ground in that district by December 31, 1910.

(To the Witness) Will you please state your name and where you live?

MR. MEINERS: My name is H. T. Meiners. I live at 403 South 39th Street.

Q. Mr. *Miners*, what is your profession?

A. I have a license to practice civil engineering in the state of Kentucky, and presently employed by the city of Louisville. That employment began twenty-one years ago in the division of engineering, and since 1949 I have become the Director of Public Works. Prior to that time I was in the Engineering Division of the Quartermaster at Fort Knox. Prior to that, about twelve years with the old Commissioner of Sewage here in Louisville. And prior to that, extensive work with the Miami Conservation District, and in all, covering

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probably more than forty years of work in public works.

Q. And about how many of those years in public works have you devoted to work here as an engineer in the city of Louisville?

A. I would say all but about six.

Q. So that would be about thirty—

A. (Interrupting) About thirty-four years.

Q. Do you occupy any official position in the government of the city of Louisville today?

A. Well, I'm one of Mayor Broaddus's directors. I'm the Director of Public Works.

Q. You are director of what?

A. Public Works.

Q. Public Works. And what duties are embraced in the office of Director of Public Works in Louisville?—generally?

A. Well, that has to do with all engineering matters, construction of streets, bridges, viaducts, alleys, sidewalks, things of that nature of a constructive——or, I should say, construction work is what I want to say.

Q. Does it have to do with any matters pertaining to the safety and maintaining or keeping the safety of public ways, streets, alleys and sidewalks in the city of Louisville?

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A. Well, in our street division we constantly patrol the streets of Louisville for repairs or maintenance, whatever the case might be, and also onto the sidewalks.

Q. Just what activities are carried on in the—in that patrolling process, and what do you see about and see after?

A. Well, in the street division there is the superintendent, foreman, workmen, trucks, all the equipment that is necessary to do street repairs, and then in the sidewalk division, which comes under the direction of the city engineer, there are inspectors that from time to time view sidewalks at various places.

Q. Do all those people work under your supervision?

A. They are in the Department of Works, but they report to various other people such as the city engineer, assistant city engineer.

Q. You are the superior of these other people to whom you refer?

A. I'm head of the department; yes, sir.

Q. Out of the long years of your work as an engineer, and since 1949 as Director of Works, Director of the Department of Works of the City of Louisville, have you or not acquired, and do you know, in general, the situation

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underneath the surface of the streets and sidewalks of Louisville, and what facilities in general are there?

A. Well, to go back here, and you read that ordinance there before, which required anything that was above the ground to be placed underground, there's not only light and power cables and telephone and telegraph lines, but there's sewers, water lines—

Q. (Interrupting) I wish you would describe—

A. (Continuing)—drainage.

Q. (Continuing)—to the jury, under the street service facilities especially in downtown Louisville, and especially

in the area around the Fourth and Market Street intersection? Describe what all exists under the surface of the streets there?

A. I thought somebody might ask that question, so I jotted down a few notes here. Within the streets of Louisville—I'm meaning now from curb to curb, and then from the curbing back to the building, and we'll call them streets and sidewalks—there were street car tracks, sewers and drainage—what I mean by that, those were sewers down the center of the street—then there are cross lines that go over to the curb to the catch basins that pick up the storm water. There are water lines, gas lines, telephone and

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telegraph conduits, light and power conduits, fire alarm conduits, traffic signal conduits, fire cisterns, cellar doors, coal holes, basement elevators, water meter vaults and key boxes and vents to basements and steam heating lines. Now, of the list of utilities that I'm talking about that run—these are running longitudinally, or parallel, with the street—along the buildings that must be served with this service there are connections that run transversly to the street—I mean, the opposite direction of this longitudinal direction—that carry the services into the building, and they usually would be a sewer connection, a water line, a gas line, a telephone line, and then light and power lines. So with all of the things that I have mentioned to you I have described that run parallel to the street and all of those connections that run transversly to the street, I think were the street suddenly opened up and everyone took a good look at it you'd be amazed how everybody got everything in almost at the same place. That generally describes the street.

Q. Is it a congested or uncongested condition existing under the surface of the street where you have all those facilities?

A. Sometimes there's very little space left, and the man that got there last, you sometimes wonder how he got in.

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Now, of all the things I'm talking about, if they were all planned at one time, maybe 'way back there in 1906 when the sewers was first built, the man that was drawing that plan was going to foresee all of these conduits and water lines and connections and what not in the street, there might have been a different plan. But he put his things in during his period, then something else come along and they put those in, and something else. So it appears to me generally that the man that came there last, he might have a little difficulty even finding a space to get in. And then I imagine what he'd try to do—I think it's a well-known fact that the gas company and the water company and the telephone company, they're all good neighbors and they try to share their grief with each other when there's something to be built in the street.

Q. By the way, among all those facilities down under the surface of the streets, which particular one generally takes up most space, the sewers?

A. Well, what I would say—that the sewer would be the largest structure in cross-section, yes.

Q. What size are those sewers around in the Fourth and Market intersection area?

MR. HOBSON: If Your Honor please, is there any possible significance to this?

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MR. BLACKWELL: Yes, I think it will be shown.

MR. HOBSIN: I would like for Counsel to advise the Court of the relevancy of this testimony, the size of the sewer.

MR. BLACKWELL: Comment has been made in the plaintiff's case—

By the Court: (Interrupting) May I see counsel at the bench just a minute, please?

(Off the record discussion between court and counsel.)

Q. What is the size of those sewers there under the surface of the street at Fourth and Market?

A. I wouldn't have any idea. I'd have to quote from memory, and I don't imagine there's any two of them the same size.

Q. I mean, are they large enough for a men to go through or even stand up in?

A The most recent sewer that was built in Fourth Street was built in a tunnel and I was a resident engineer on that for the Commissioner of Sewage, and that's a seven-foot sewer.

Q. And where is the sewer located? what portion

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of the street?

A. In the center of Fourth Street. Runs north and south.

Q. Now, how do you, if you know, how do the people who are in charge of those various underground facilities get down to those facilities to maintain them and service them?

A. That's—

Q. (Interrupting) Through what?

A. Through a manhole.

Q. Mr. Meiners, generally, and referring especially to the Fourth and Market Streets intersection, where are most manholes located? between intersections or at intersections?

A. Oh, you'll find more at the intersections.

Q. Will you explain to the jury why in that crowded condition the manholes have to be located at the intersections of streets?

A. Well, that would come at junction points where you are changing the course of your lines. If you are com-

ing up Market Street with one and wanted to go to Third or Fourth or Fifth or any other street, it's a point of intersection. Therefore, you'd have a manhole, and go off in another direction.

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Q. Are you or not familiar in general with the manholes and the covers on manholes over the city of Louisville and particularly in the District A as defined in the ordinance of 1906, the downtown part of Louisville?

A. Well, I imagine I would, by reason of the fact of so many years of sewer construction with the city that you would become familiar with other things that were in the street.

Q. Are there many or few manholes with covers on them in the downtown portion of Louisville, irrespective of who may own or be in control of them? Are there many or few?

A. I might have to answer that question by making an estimate. I'm going back again now to your 1906 ordinance where you said from Sight to Floyd, Broadway to York, with the exception—or Broadway to Main with the exception of Market to York which runs from Second to Fifth. Now, in that area there is seventy-one city blocks, and about the only way I could answer that question to you is just from general observation and memory, assuming that there would be ten to the block, seventy-one blocks, and there would be seven hundred ten manholes, which would be my fair guess of it.

Q. Let's take one or two utilities and see if

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we can get the facts about their manholes? Take the Louisville Water Company for instance. About how many manholes does it have in the city of Louisville?

A. Speaking city-wide?

Q. City-wide, yes; the Louisville Water Company?

A. Well, now, the city covers fifty-one square miles—that's a whole lot of area. I would make an off-hand guess of, maybe a couple of thousand. That's a pure guess on my part.

Q. Is that based upon your general observation and experience over these many years?

A. That's right.

Q. Take, for instance, the Louisville Gas and Electric Company. About how many manholes with covers on them would you say that Louisville Gas and Electric Company has in the city of Louisville?

A. Well, I suppose you could take now about the Louisville Gas and Electric Company—and you're talking about the underground system primarily?

Q. That's right; yes.

A. As long as they've got things hanging on poles, they don't need no manholes. Well, again going back to the seventy-one blocks, I feel sure that they'd need manholes at

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street intersections, possibly in alleys, going up and down alleys. Again I might say ten to the block. Say seven hundred ten; between that maybe and a thousand.

Q. And then if you took in the entire city of Louisville about how many Louisville Gas and Electric manholes with covers on them would you estimate, based upon your general knowledge?

A. Well, the further away you got from the business section and getting out to the outskirts or the fringe areas of the city, they would become less. I'd say possibly you might double that figure. That's—I'm just shooting at the moon, almost.

Q. To get the total number?

A. Yes.

Q. Mr. Meiners, in your official position as Director of Works of the City of Louisville, have you, and in your long

experience prior to that as an engineer in Louisville, have you become acquainted in general, and do you know in general, the facts about the design of manhole covers and whether or not they have holes in them, through the covers?

A. Oh, yes.

Q. In your official capacity as Director of Works,

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are you, or someone under your official supervision, required to pass on permits for excavations and installations in the streets and public ways of Louisville?

A. Any hole that's dug in the streets or the sidewalks in the city of Louisville is done by permit.

Q. Have you in connection with reviewing such applications for such permits further become acquainted with the subject of manhole cov s and whether or not they have holes through the tops?

A. Well, unless with the permit that is issued—I mean, the application that is asked for—there's a plan submitted. In that case you'd know just where all the manholes are and where the conduits or whatever you might be working on are. You'd know the exact location of it, yes.

Q. Tell the jury whether or not it is a common or uncommon practice and for many, many years has been a common or uncommon practice throughout the city of Louisville, and especially in the downtown area, for manhole covers to have holes in their tops, through the manhole cover or top?

A. Well, if I—if I were designing anything that was under ground and to avoid the accumulation of foul air, or mold or fungus growth of some kind, I would certainly be looking for circulation of fresh air, and I would so

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design it.

Q. If a manhole is not provided with a cover that permits what you refer to as circulation of fresh air, what may

reasonably be the consequences?

A. Well, there'd be an accumulation of foul air.

Q. What kind of foul air?

A. Well, it could be of an explosive nature, if there was a leak in the city street of the natural gas line.

Q. Could it be of a poisonous nature also?

A. Well, I don't know. I'm not a chemist, and I don't know what gases are poison and those that are not. I'd better not answer that question.

Q. All right. Now, more specifically, what is the purpose of—(To the Reporter) Strik hat. I'll go back to my original question. Is it or not a common practice in Louisville, and for many years has it or not been a common practice in Louisville, to have—for manholes to be designed and manufactured—for manholes covers to be designed and manufactured with holes in their tops, through them?

A. That's evidently true, just by general observation in looking at manholes that are now in the streets, in the sidewalks, and observing the covers. And there is.

Q. You, in stating your rather wide experience

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as an engineer, referred to working elsewhere than in Louisville, I believe, did you not?

A. That's right.

Q. Have you acquired in that method knowledge of places elsewhere, other cities, or have you in your official capacity in Louisville, through attending meetings of other officials occupying similar positions in other cities, become familiar with the situation about manhole covers in other cities generally?

A. Well, I worked for a couple of years in the city of Cincinnati for the city of Cincinnati when at that time they didn't know where or how many miles of sewers they had, and I was part of a comprehensive survey in the city of Cincinnati to see how many miles of sewers the city had, what their sizes were and what their—

MR. HOBSON: (Interrupting) Your Honor, this is extremely interesting, and I appreciate it. But I fail to see any—

BY THE COURT: (Interrupting) I think we can get to it much more quickly. If he has experience outside, let him state it. But keep to the manhole covers. I think we're taking too much time.

A. Judge, Your Honor, in order to get into these

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underground structures I had to go down through manholes.

BY THE COURT: Yes.

Q. Is it or not a common practice all over the country for manhole covers to have holes through them?

A. That's my general opinion; yes, sir.

Q. As an engineer, and based upon your knowledge and your long experience, please tell the jury what might reasonably happen if manhole covers did not have holes through them?

BY THE COURT: I think that's repetitious, Mr. Blackwell, and it's been answered that there could be explosions.

MR. BLACKWELL: Are you sustaining an objection to that, sir?

BY THE COURT: No; you may answer. There's no objection been made. He has stated in answer to that question heretofore—

A. (Interrupting) Well, the Judge answered it for me. That's what I was going to tell you.

Q. Go ahead?

A. There could be explosions.

Q. Explosions?

A. There could be explosions in air-tight chambers

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under ground with no ventilation.

Q. Do you know of your own knowledge of such explosions having occurred?

A. Oh, I've read from year to year probably in trade journals and engineering magazines where such explosions occurred and probably flip a manhole lid over on top of a building, or something like that. That happens.

Q. What may spark one of those explosions? What may cause it?

A. I wouldn't know. You're getting out of my field now.

Q. Now, I want to get on a little different subject. Do you know what a catch basin is, Mr. Meiners?

A. Yes, sir.

Q. Tell us what—about how many catch basins there are in Louisville in the streets and alleys?

MR. HOBSON: Your Honor, are we going to try catch basins now?

MR. BLACKWELL: They've got holes in them; yes.

MR. HOBSON: Well, you just as well try my head; it's got holes in it.

MR. BLACKWELL: Just the same kind of

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appliance.

A. Shall I answer?

Q. Yes.

MR. HOBSON: Did Your Honor pass on the objection?

BY THE COURT: I'm going to let him answer. But we are getting quite far afield, gentlemen.

A. It's a short answer—fifteen thousand, about.

Q. They are grill-like affairs, are they not?

A. Well, they are different from that manhole that you see sitting there on the floor. Instead of having circular holes, they have rectangular slots in them, and the

slots would measure an inch and a half wide by seven inches long, and there are about eighteen of those slots into a lid or cover that would measure about twenty-one inches long and possibly nineteen inches wide.

Q. Generally, where are those catch basins located?

A. They are setting right at the curbs at intersections providing it is the lowest intersection within that block. They set at low points to pick up storm water.

Q. Will you—are there many or few cellar doors

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in downtown Louisville?

A. Well, I would say there would be quite a few.

Q. Would you give us your best estimate as to the number?

A. Well, again, I've got to go back to my seventy-one blocks, and, say a block has four sides, that would give you two hundred eighty blocks—

MR. HOBSON: (Interrupting) Now, Your Honor, may I consult with Your Honor just a moment before Your Honor passes on this matter. I'm perfectly willing to let him go, but I want it understood that I am going to examine him on this matter.

MR. BLACKWELL: All right. (To the Witness) Go ahead, Mr. Meiners, and tell about the cellar doors and sidewalks?

A. Well, I've kinda lost my thought there. I've got to get started back on it. Again going back to the seventy-one blocks, four sides to a block, say two hundred eighty, and if there was four in a block you'd easily have, say, eleven hundred.

Q. How many?

A. Eleven hundred, by that estimate. Or unless I wanted to raise that four to six, then I'd have about

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five hundred more.

Q. How are those cellar doors constructed? They are

metal, of course, I know, and everybody else knows that. But are they a grill-work affair?

A. Some of them are a solid sheet of metal. Others have oblong holes in them that would measure about an inch and quarter to fifteen to twenty inches long. There might be a dozen in each half of a door to make the full cellar door. They raise in the center and get up in a vertical position, and you are ready to enter into a cellar.

Q. They are generally located in the sidewalks, I believe?

A. Adjacent to the building; yes, sir.

Q. Are you familiar with holes in sidewalks that are generally referred to as coal chutes?

A. Oh, yes. These's quite a number of those—

Q. (Interrupting) Describe—about how many in District A?

A. Oh, there would be less of those than they are cellar doors. You might find maybe two in a block, so that would be maybe a fifth of what that other figure was, which was eleven hundred—say, two hundred twenty-five.

Q. What kind of covers do they have?

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A. They usually have cast iron covers that set into a solid frame that is fastened into the sidewalk or rests on the coal hole proper, and they have all kinds of fancy little designs. It appears to me that back there maybe when these molders were making such articles as that what one would try to do would be to outdo the other to get something fancy, and sometimes you'll see holes in there that measure an inch and go in all kinds of fancy directions that probably gets to an inch and half, or some of the openings, that is, in the longest direction across, might measure about two inches.

Q. Please state whether or not it is a part of your official duties as Director of Works of the City of Louisville

to inspect or have inspected under your supervision manholes in the streets and alleys and public ways of the city of Louisville?

MR. HOBSON: Now, if Your Honor please, are we talking about manholes or manhole covers?

Q. I'll limit that—to covers on manholes?

A. Well, it's a duty—

Q. (Interrupting) To determine their safety or unsafety?

A. It's the duty of the superintendent of our

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street division to observe anything and everything that's in the street. Primarily, he's looking for street surfaces, for holes and things of that nature, and if there's anything certainly that appears might be a hazard or dangerous, why, it's his duty to repair it, because everything in the street is repaired by the city and at the city's expense where inspectors walking up and down sidewalks finding out any repairs on the sidewalk to be made, that's the duty of the property owner, and he is very promptly notified that a bad condition exists at such and such a location, and, we'll say in ten days it must be repaired, and if it isn't repaired I think the law department over in the city hall has enough ordinances and what not to back it up to bring anyone into ordinance court.

Q. In other words, if an inspector shows that a dangerous condition exists and its the duty of someone other than the city to make it a safe condition you call upon that person to do—

A. (Interrupting) That's right. In the streets its our own employees, and on the sidewalks it's the property owners.

Q. I think you have probably more than qualified to answer the last question I want to put to you. State

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whether or not in your opinion a manhole cover such as Defendant's Exhibit 1 to which I now direct your attention, and I'll ask you to walk over here and look at it, with four holes arranged in a rectangular manner in the central portion of that manhole cover, does or does not create any unsafe condition in a public street in Louisville?

(Witness examines Defendant's Exhibit No. 1.)

A. I think anyone exercising just the slightest care there wouldn't be anything unsafe about that.

MR. HOBSON: We object, and move to exclude the answer.

BY THE COURT: Sustained. And the jury will not consider the answer. It's not responsive to the question.

Q. Answer my question specifically, if you will, please?

A. Will you ask me the question again, please?

Q. (To the Reporter) Will you read the question to him?

(Whereupon, Mr. Blackwell's Last Question is read by the Reporter.)

A. It does not.

Q. That's all, Mr. Meiners. They'll have some questions.

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Cross-examination by Mr. Robert P. Hobson

MR. HOBSON: Mr. Meiners—

MR. MEINERS: Yes?

Q. In the last five years how many lawsuits have been brought against the city of Louisville for the negligent maintenance of the public sidewalks by reason of these cellar doors that you were talking about a few minutes ago?

A. I don't pay any attention to the number of lawsuits, but I do get—

MR. BLACKWELL: (Interrupting) Your Honor, I object to the question.

BY THE COURT: Over-ruled.

MR. BLACKWELL: It's not shown that the witness has any knowledge on the subject, not shown what the lawsuits were about, how they came about.

Q. (To Mr. Blackwell) The Court's overruled your objection. (To the Witness) Mr. Meiners, I want you to come down here, please, sir, if you will, and tell the jury first whether I understood you correctly to say that you knew about the design of manhole covers, is that right?

A. In what way did I answer that?

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Q. Mr. Blackwell asked you if you knew about the design of manhole covers, and you said you did?

A. I do.

Q. Now, is that right?

A. I do; yes, sir.

Q. All right. Now, I want you to look at this manhole cover, very carefully, Defendant's Exhibit 1, and tell the jury first, when that cover was manufactured?

A. I wouldn't know.

Q. By whom was it manufactured?

A. I wouldn't know.

Q. Who put these four holes in it, or any one of them?

A. The manufacturer.

Q. Mr. Meiners, don't you know that the manufacturer did not put those holes in there, but that each of these places is a prospective hole and that the user of the cap knocked those holes in there himself? Now, isn't that a fact?

A. Do you mean that this is a plug in here?

Q. Yes, sir.

A. That's a solid metal.

Q. That's a plug and can be knocked out, and was

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knocked out in each of those four holes that you see there?

A. Well, then at that time—

Q. (Interrupting) I'm not asking you when. I want you to tell the jury whether or not that's right or not?

A. I don't know. I assume you're telling me.

Q. No, I'm asking you.

A. I can't tell from the appearance of that what—

Q. (Interrupting) You say you know about the design of manhole covers?

A. Yes.

Q. Now, was that one designed the way you see it there, or were those holes knocked in there by the user?

A. We're looking at a finished product here, and my answers to your questions concerned the design, which took in all of this fancy work you see on the top, the location of the holes in it and where these lift holes were going to be and things of that nature, then this was passed on to the manufacturer and the manufacturer has completed it and passed it on for its use and now you ask me the question whether that is designed properly that—

Q. (Interrupting) I didn't ask you whether or not they are designed properly at all. I asked you if it was

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designed with those holes, those four holes, or any one of them, in it?

A. Now, the only way I could do that would be look at the plans that the engineer furnished the foundry.

Q. Mr. Meiners, you either know or you don't know. Do you know?

A. I would know if I had the plans that was given to the foundry to produce that product?

Q. Well, at this moment, do you know?

A. No.

Q. All right. Thank you. Now, just have your seat.

Would you tell us approximately the diameter of that manhole cover?

A. I'd say about thirty-two inches.

Q. All right. Now,—

A. (Interrupting) Just guessing at it.

Q. Yes, sir. I take that. Now, within the area of Broadway to Main, and I limit it to First and Seventh, how many, just approximately, manhole covers of about that size are there?

A. Well, I answered that question before by going back to the 1906 ordinance, and we said that we had seventy-one blocks in the city, and I think the figure was

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six or eight or whatever it was per block. That question has already been answered.

Q. Well, I—I used a little bit different territory in my question than the 1906 ordinance as you recall?

A. Well, Judge, I can't—

Q. (Interrupting) And I'm not a judge. Just tell us, if you please, just approximately? I'll take five hundred, a thousand, fifteen hundred, two thousand, three thousand, any number you suggest.

A. Were you describing a specific area?

Q. About that size; yes, sir—First to Seventh, Boradway to Main?

A. Well, that's the seventy-one blocks. I would say about seven hundred.

Q. All right. Now, you are talking about seven hundered of those what I call big manhole caps?

A. Yes, sir. That's right.

Q. Yes, sir. Now, they would be primarily the telephone company, the water company, and the Gas and Electric Company, wouldn't they? That would be the biggest part of them?

A. Well, I don't think the water company would

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very many of them in there.

Q. All right. Then the biggest part of them would be the telephone company and the gas company, right?

A. Yeah.

Q. Sir?

A. Yeah.

Q. All right. Now, the Western Union Telegraph Company has very few of them, doesn't it?

A. Well, if they do, it would come about in that they would be in a lesser number of streets in those areas than the others.

Q. Well, is it true or not then that—

A. (Interrupting) It is.

Q. Sir?

A. It is.

Q. That is, very few of them?

A. They occupy lesser spaces in the city than the gas company does.

Q. (All right. Now, as between the Western Union and the telegraph—and the telephone company, Southern Bell Telephone Company, the telephone company has many more of these so-called manhole caps than the Western Union, doesn't it?

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A. That would be my considered opinion; yes, sir.

Q. Yes, sir. And it has anywhere from two to ten times as many, doesn't it?

A. I wouldn't know that.

Q. Well, could you give the jury some approximation?

A. Well, you mentioned two first. I'd say I'd say two.

Q. Oh, you think just twice as many?

A. Well, I don't know. That's just—

Q. (Interrupting) I see.

A. I'm just reaching out in the air for a figure, and

you suggested that.

Q. Now, Mr. Meiners, other than the two manhole covers that the Western Union has at Fourth and Market, do you know of any other that it has?

A. I'm not familiar with their records and plans. I wouldn't know that.

Q. You don't know that then?

A. I don't know; no, sir.

Q. All right. You do know that the telephone company has many, don't you?

A. That's right; yes.

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Q. Now, the manholes of—hole of the telephone company and the manhole of the Western Union serve substantially the same purpose, don't they?

A. Well, I suppose there are duct lines in the city where more than one utility is in the same system.

Q. But the telephone wires and cables in the underground conduit release through the manhole, or access is given through the manhole, and the underground lines of the Western Union are substantially the same, aren't they?

A. I didn't quite follow you, sir.

Q. Well, Mr. Meiners, isn't it a fact that the telephone company has underground, electrically energized wires in its underground conduits?

A. Yeah; that's right.

Q. And the telegraph company has the same thing?

A. Same thing; yes.

Q. All right. So the underground conduits of the two companies are very similar?

A. That's right.

Q. Yes. And therefore the hazards to be contemplated with the use of manholes and manhole covers as to the telegraph company and the telephone company are substantially the same, aren't they?

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A. Well, yes, I wouldn't be at all surprised if one company didn't allow the other to use their ducts. I don't know.

Q. That's not what I'm talking about. The hazards to be contemplated with respect to the manhole covers are substantially the same between the two companies, aren't they?

A. They are both under ground.

Q. And you don't see any substantial difference as between the two, do you?

A. No, sir.

Q. All right. I want you to think about this question very carefully and give this answer to this jury without any question, if you will, please. Isn't it a fact that there isn't a single manhole cover of the telephone company in downtown Louisville that has any hole in it whatever? Isn't that true? And if it's not true, tell me where there's one located?

MR. BLACKWELL: We'll show you a good many, Mr. Hobson.

MR. HOBSON: I didn't ask you. And, if Your Honor please, I think that's highly improper.

BY THE COURT: And the objection is, of course, sustained.

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A. I don't know by what means that I could identify one company from the other unless we were walking out in the street and looked at that. Therefore, I—I don't think I'm able to answer that question.

Q. Well, Mr. Meiners, don't you know that the telephone company has the telephone company's name on it and not only that but has the imprint of a bell on it?

A. It does, when I walk out in the street and look at it.

Q. We didn't ask you whether you—it has it whether you walk out in the street or not, doesn't it?

A. Well, at a lof of times you can see things, you know, without looking, and then again you can go looking for that thing and don't see it. So, probably there's a case where I didn't see it.

Q. Well, let's see if we can't get an answer to this very simple question. Will you tell the jury whether before you testified here today you made any examination of even one manhole cover used by the Southern Bell Telephone Company?

A. Well, I depended a whole lot—

Q. (Interrupting) No, no. If you please. Your Honor, may I have an answer to my question?

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A. No; no; no; I didn't, no.

BY THE COURT: Yes.

A. No, I didn't.

Q. Then you can't tell the jury whether within a hundred yards of the spot where you are sitting there are a half dozen telephone company manhole covers that don't have a single hole in them?

A. No, sir; I couldn't tell you.

Q. Now, Mr. Meiners, let's go back to this Defendant's Exhibit Number 1 for a little bit more. In your experience and knowledge of the design of manhole covers, I'll get you to tell the jury if it isn't a fact that manhole covers are manufactured, designed and manufactured, with a depressible hook substantially in the center, sometimes on the side, that can be raised up enough for a bar to get under it, or another hook can get under it, and lift the manhole cover off, and when it's not in use, to be pressed down on a level with the balance of the cover?

A. I have never seen any.

Q. Never seen one of them?

A. No, sir.

Q. Did you ever look at a manhole cover at Fouth and Market?

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A. Not in that detail; no, sir.

Q. And you have never seen a cover like that?

A. The ones that I'm familiar with—

Q. (Interrupting) I'm not talking about the ones that you are familiar with. I'm asking if you have seen that kind?

A. I answered it.

Q. And you have not?

A. No, sir.

Q. Now, do I understand you to say that the holes in the cover as illustrated by this Defendant's Exhibit Number 1 are for the purpose of permitting gas to escape?

A. Circulation of air, I said.

Q. Well, let's put it a little differently. Are they for the purpose of permitting gas to escape?

A. I'll give you the same answer. It's for circulation of air.

Q. Your Honor, may I have an answer?

By the Court: Yes. Mr. Meiners, as all witnesses are required to do, make a responsive answer to the questions that are asked you, and then if it is necessary you may explain it.

A. Well, in this case then, where I say the circulation of air, and if there was any accumulated gases within

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that area, it would flow with the current of air.

Q. Well, now, Mr. Meiners, what I want you to tell the jury, what I would like to know for my own information, is whether the holes that you see in this Defendant's Exhibit 1 are for the purpose of permitting gas to escape from the manhole?

A. Yes; yes; surely.

Q. That's true?

A. Yes.

Q. And if those holes don't exist then of course the gas can't escape, can it?

A. That's right.

Q. And that then becomes a safety hazard on the streets of the city of Louisville, doesn't it?

A. That's right.

Q. Now, I want you to tell the jury have you ever at any time made any complaint to the Louisville Gas and Electric Company that it had stopped up the holes on its manhole covers because you thought there was danger of a gas explosion?

A. No, sir; I didn't.

Q. Thank you, sir. Mr. Meiners, . . .

A. Yes?

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Q. Did you know that the Gas and Electric Company had stopped up the holes in their manhole covers?

A. Well, I knew something about some rivets.

Q. Your Honor, I don't think the witness has answered the question.

A. Do you mean did I have knowledge that they went into the street and plugged these holes up?

Q. Yes, sir.

A. No, no.

Q. When did you say you found out about these rivets?

A. Well, that's just in general conversation.

Q. Do you mean with these lawyers here?

A. No, sir.

Q. That's all.

MR. BLACKWELL: That's all, Mr. Meiners.

A. I heard Mr. Jaegles talking about them, sitting right in this chair.

MR. HOBSON: Thank you, sir.

BY THE COURT: Next witness, please.

(Witness excused.)

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MR. BLACKWELL: In arranging for the attendance of some other witnesses, might I inquire about when the Court intends to recess for the day?

BY THE COURT: Not before five o'clock.

MR. BLACKWELL: Not before five?

BY THE COURT: Unless you finish before that time.

MR. W. M. GOFORTH, called as a witness on behalf of defendant, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Will you please state your name and where you live?

MR. GOFORTH: W. M. Goforth. I live at 653 South 40th Street.

Q. Here in Louisville?

A. Yes, here in Louisville.

Q. What is your profession or occupation?

A. I am at this time the City Foreman for Western Union.

Q. City Foreman for Western Union Telegraph Company here in Louisville?

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A. Yes, sir.

Q. How long have you been connected with the Western Union Telegraph Company's business here in Louisville?

A. Four years.

Q. Generally, what are your duties as City Foreman?

A. Well, we—the maintenance work altogether, that's all.

Q. Mr. Goforth, I want to ask you some detailed matters, and if you have some notes before you, you may refer to them in making your answer. Have you made a study of each manhole of the—of the cover on each manhole in Fourth Street from the south line of Main Street to the north line of Jefferson Street, and in Market Street from the west line of Third Street to the east line of Fifth Street, Louisville?

A. Yes, sir; I have checked them.

Q. How many manholes with covers on them are there in that area?

A. Seventy-seven.

Q. The area which I have described to you, I believe, radiates out one square in each of these four directions from the intersection of Market and Fourth Streets in Louisville?

A. Yes, sir.

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Q. In that area were there any Western Union manholes with covers on them?

A. Yes, sir.

Q. How many?

A. Twelve.

Q. I want you to tell the jury whether or not there were any holes in any or all of those twelve covers?

A. Yes, sir; there's holes in all of them.

Q. Will you please describe those holes in each of those twelve manhole covers that belonged to the Western Union?

A. The four holes around the center of the hole, and then we have—

Q. (Interrupting) In each cover?

A. Yes, sir.

Q. Go ahead.

A. And also what we call the lift hole on the edge.

Q. Now, what is the diameter of those four holes in the Western Union covers?

A. Well, sir, the specifications—

MR. HOBSON: (Interrupting) Now, If Your Honor please, I object to the diameter of the hole in any

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cover except this one right here.

Q. All right. In the cover of Plaintiff's (sic) Exhibit 1?

A. Well, that particular manhole—

MR. HOBSON: It would be Defendant's Exhibit A.

Q. Defendant's Exhibit A.

A. In that particular manhole I'm sure they are 1-1/16 inch.

Q. Did you find any Western Union manhole cover different in its design or in the holes or the size of the holes from the Defendant's Exhibit A manhole cover?

A. Well, no. The Western Union manholes are all the same design. That is, now. But the holes will vary just a fraction. But they are—the specifications call for a one-inch hole.

MR. HOBSON: We object to what the specification calls for, Your Honor, and move to exclude it on the ground that we are not concerned with the specification but with the actual facts.

BY THE COURT: Well, overruled. We are discussing the construction of the manholes, and as I understand it you say that the specifications call for one, and they vary

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slightly, is that correct?

A. Yes, sir.

BY THE COURT: But that this exhibit is 1-1/16 inches?

A. That's right.

Q. Mr. Goforth, did you find among those seventy-seven manholes covers in this area that there were any sewer manhole covers, and if so, please state how many?

A. I had ten in this area.

Q. Does those sewer man-hole covers have any holes in the covers or not?

A. Yes, sir. They have a—

Q. (Interrupting) How many holes?

A. Well, they varied. Those I found—it's not a hole. I call it—it's a— one inch by two and half inches long, and they vary in this area from sixteen to forty-seven holes in this area we're speaking of.

Q. To how many?

A. Sixteen to forty-seven holes.

Q. In other words, out of ten sewer manhole covers one or more of them had sixteen holes in them?

A. Yes, sir. And one I know—

Q. (Interrupting) And one or more of them had as

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many as forty-seven holes in them?

A. Yes, sir.

Q. I believe you gave the dimensions of each hole in those ten sewer covers as one inch wide and two and a half inches long?

A. Yes, sir.

Q. Is that more or less of an oval-shaped hole?

MR. HOBSON: That's an impossibility. There couldn't be forty-seven holes in there one inch by two and a half.

BY THE COURT: I'm not a very good mathematician. I don't know whether that would—

MR. HOBSON: (Interrupting) That just wouldn't fit.

Q. Did you count the number of holes?

A. I didn't. But I had a man to count them.

Q. Were you with him?

A. No, I wasn't with this partciular fellow that counted them.

Q. Who was that? Mr. Reed?

A. No, Mr. Lawson, the cable man, counted the holes in this one particular manhole.

Q. Now, did you find any Southern Bell Telephone

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and Telegraph Company manhole covers in that same four-block area?

A. Yes, sir; there's eleven.

Q. How many?

A. Eleven holes.

Q. Tell the jury whether or not each of those eleven Southern Bell manhole covers had holes in them?

A. Well, I'm—speaking of holes, I suppose they're holes. Their hole is on the edge, half-mooned shaped, on the rim.

Q. All right. How many of those half-moon shaped holes were in each of those eleven manhole covers?

A. They's two on each side, just alike.

Q. Opposite each side?

A. Just on the order of those.

Q. Tell the jury the size of those half-moon shaped holes, those four half-moon shaped holes in each cover?

A. They are—I'll call them—I'll say one inch deep from the rim, measured in towards the center of the cover.

Q. And how much—what is its diameter along the circumference?

A. About 1⅜ inches.

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Q. How much?

A. About a 1⅜ inch opening around the edge.

Q. Now, did you determine whether or not those four

half-moon shaped holes in the Southern Bell manhole covers go all the way through and down into the manhole, or were they made like the little notches on the Defendant's Exhibit 1 which rests down on the shoulders? Did they go all the way through?

A. Yes, there was an opening there between the hole and the shoulder—that is, the rim of the casting of the manhole.

Q. When those Southern Bell manhole covers are in place on the manhole, would, for instance, a rod, if placed on one of those four half-moon holes drop on through into the manhole, say a 3/8, or an inch rod?

A. An inch wouldn't, but I'd say a 3/8ths would. I stuck a big screw driver—

Q. (Interrupting) In other words, the hole is not covered up by any shoulder on the manhole or anything like that?

A. No, I wouldn't say that. The shoulder doesn't block out the hole. That's my observation.

Q. Now, did you find any Louisville Gas and Electric manhole covers in that same four-block area, and if

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so, state the number?

A. Yes, sir; there's—in that area there's forty.

Q. Forty?

A. Yes, sir.

Q. Did those manhole covers have any holes in the top?

A. Yes, sir. Each one of them had a one-inch hole.

Q. About where in the top was that one-inch hole?

A. Oh, I didn't measure, but I'd say it's about five inches from the rim in towards—

Q. (Interrupting) Was that an open hole, or a hole that had a rivet in it?

A. No, it was just an open hole, a clear hole.

Q. Was there any rivet in it at all?

A. No, sir; I didn't see it. In these, no.

Q. Did you see any rivet in any Louisville—any one of those forty Louisville Gas and Electric manhole covers in that four-block area—four-block area, that had a rivet in it?

A. No, sir.

Q. Did you find any manhole covers which you could

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not identify by the legend or name appearing on it?

A. Yes, sir. I found—there's four that there's no name on it, that I called unknown.

Q. Tell the jury whether or not each of those four unidentified by name manhole covers had any hole in it?

A. Yes, sir; they had a hole.

Q. Describe the hole that was in each of those four covers?

A. One inch—I'd say one inch by one and a quarter holes. Now, that's in the center of the cover. It's a kind of a—I don't know what you call it—an oblong, right in the center of it.

Q. It was stated in the presence of the jury here that there were—or are manhole covers in the area of the Fourth and Market Street intersection which didn't have a hole in them, is that correct or not?

A. Yes, sir. There's one—I found one manhole that doesn't have—cover that doesn't have a hole in it.

Q. What is that?

A. That's a —it's a sewer.

Q. A sewer?

A That's what I'd *s*all it.

Q. Out of the seventy-seven manholes which you—

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each of which you have described, there was only one that didn't have a hole in it?

MR. HOBSON: If Your Honor please, we object to the leading question, and the mis-statement in it.

BY THE COURT: That's a leading question. All right.

MR. HOBSON: Is that all, Mr. Blackwell?

MR. BLACKWELL: That's all, Mr. Goforth.

Cross-examination by Mr. Robert P. Hobson

MR. HOBSON: Mr. Goforth, will you tell the jury, please, when you made the investigation, the report of which you have given to the jury from the notes you have there in front of you?

MR. GOFORTH: Yes, sir. I checked this on the 25th of October.

Q. Who directed you to do that?

A. The lawyer—Mr. Blackwell.

Q. Did you happen to go to the Louisville Gas and Electric manhole cover at Fourth and Market today?

A. No, sir.

Q. You don't know whether there's a plug in it today?

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A. No, sir; I couldn't say.

Q. And you don't know whether there was a plug in it on the 8th of March, 1954?

A. No, sir.

Q. I'd like for you to be perfectly sure about this question before you answer it. Did you yourself check that Louisville Gas and Electric manhole at Fourth and Market on October the 25th?

A. I checked them all in that area.

Q. I say, did you check that one that you say did not have a plug in it?

A. Oh, that's not a Louisville Gas and Electric manhole.

Q. You say it is not?

A. No; that was a sewer.

Q. What?

A. You must have misunderstoood me. There's one out of that area—

Q. (Interrupting) Now, Mr. Goforth—excuse me, I didn't misunderstand you, and I don't think you misunderstood me.

A. Well, I'm sorry—

Q. (Interrupting) I understood you to say that

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the Louisville Gas and Electric Company had forty manhole covers within the area given to you by Mr. Blackwell?

A. That's right.

Q. Now, tell the jury now, regardless of what you said before, whether any of those manholes had all of the —manhole covers had all of the holes in them plugged up?

A. All of the covers had holes plugged up?

Q. That's right?

A. No, I didn't say anything about a plug.

Q. Well, you know what a plug is, don't you?

A. Yes, sir. I didn't see any manhole anywhere with a plug in it that I called a plug.

Q. Now, Mr. Goforth, do you mean to tell this jury that you haven't seen the manhole covers of the Louisville Gas and Electric Company with the one-inch, or inch and a quarter, or 1-1/16 inch holes in the covers plugged up—

A. (Interrupting) Do you mean—

Q. (Continuing) —with a steel or iron pin?

A. Do you mean that's what they're talking about, that rivet?

Q. Yes.

A. I haven't seen it.

Q. You haven't seen that?

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A. Not a rivet like that; no, sir.

Q. And you didn't see that anywhere within the area of one square, or one block, of Fourth and Market?

A. No, sir.

Q. That's all. Let me direct your attention here just a minute. Do you see this circle here marked 15?

A. Fifteen?

Q. Come over here and take a good look at it. Do you see that?

(Witness leaves witness stand and goes to map board.)

A. Yes.

Q. Is that a Louisville Gas and Electric manhole cover?

A. According to—

Q. (Interrupting) Not according to this. I'm talking about according to you.

A. That's right.

Q. What? I thought you said there wasn't any there?

A. What?

Q. Louisville Gas and Electric manhole covers?

A. No, I didn't say it wasn't. I said I didn't know about a plug in it.

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Q. All right. You tell this jury that on October the 25th you yourself examined that manhole cover indicated by number 15 on Defendant's Trial Map, did you do that?

A. I checked all of them.

Q. Oh, no. Did you check that one?

A. Yes, I checked it.

Q. And it had a hole in it?

A. Yes.

Q. You saw that?

A. Yes, one hole.

Q. What time?

A. What time of day?

Q. Yes, sir.?

A. Oh, it was around noon, I thought, something like that.

Q. Anybody with you?

A. Yes, sir; Mr. Reed.

Q. What's his name?

A. Reed.

Q. What's the full name?

A. George Reed.

Q. George Reed, and he works for Western Union, too?

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A. Yes.

Q. That's all.

(Witness excused)

BY THE COURT: Just one minute. We'll give the jury a short break, a very short break, and ladies and gentlemen of the jury I again admonish you not to talk about this case, permit it to be discussed in your presence, or form any opinion until it has been finally submitted to you. Mr. Crier, we'll take a fifteen-minute recess.

(Whereupon a short recess was taken)

MR. GEORGE W. REED, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Will you please state your name and place of residence?

MR. REED: My name is George W. Reed, and I live at 808 South 40th Street.

Q. What is your profession or business?

A. I'm assistant city foreman for the Western

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Union Telegraph Company, Louisville.

Q. How long have you been connected with the Western Union Telegraph Company in Louisville?

A. Little over thirty-two years.

Q. During that thirty-two years' period, what particular kind of business of the Western Union in Louisville has—have you had duties with reference to?

A. Well, I've been section lineman, signal lineman, and assistant city foreman.

Q. Have you or not had duties connected with the underground system—

A. (Interrupting) Yes, sir.

Q. (Continuing) —of the Western Union—

A. (Interrupting) Yes, sir.

Q. (Continuing) —during all that time?

A. Well, not all that time, but I always helped out. I mean, if they had trouble or anything like that, I'd help out on it.

Q. Are you familiar with the Western Union's underground system, and I mean by that, it's lines and other facilities under the streets in the city of Louisville, and particularly in the downtown area and around the Fourth and—the Market and Fourth Streets intersections?

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A. Yes, sir; I am.

Q. Are you or not familiar with the question whether—(To the Reporter) Strike that if you will, please. Are you familiar in a general way with manhole covers of various utilities and other persons who have underground facilities in Louisville with manholes to reach them and covers on those manholes?

A. Yes, sir.

Q. Will you answer—

A. (Interrupting) Yes, sir.

Q. Thank you. Tell the jury whether or not the—it is common or uncommon for manhole covers in the city of Louisville to have holes through those covers?

A. Yes, sir; I think so; yes, sir.

Q. How long has that been true? How long has it existed?

A. Well, it's existed ever since I've been in Louisville.

Q. I beg your pardon?

A. It's existed ever since I've been here.

Q. In other words, at least for thirty-two years?

A. Yes, sir.

Q. Why, Mr. Reed, are there holes in manhole covers?

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A. Well, to allow foul air or gas to escape, but—

Q. (Interrupting) State whether or not gas tends to accumulate or form in manhole covers or other underground facilities?

A. It does.

Q. What kind of gas?

A. Well, my experience here has been mostly with natural gas.

Q. Are there other gases which also sometimes form?

A. Well, there's soil gas.

Q. What do you mean by soil gas?

A. That's gas that gets in the soil and accumulates in the soil, and then it gets in the manholes.

Q. What about sewer gas?

A. Well, sewer gas gets in the manholes.

Q. Tell the jury what may reasonably happen if gas is permitted to accumulate in a manhole and is not, and has no facility by which it escapes from that manhole?

A. There's a possibility of an explosion.

Q. How do you know that, Mr. Reed?

A. Well, it could be by combustion or the possibility of a spark getting to it some way.

Q. Well, have you ever known of any such explosion

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occurring?

A. Not of that type, no.

Q. When?

A. Well, I—I didn't see it, but I saw a man that come out of it. They brought him to the office. The—I don't know what kind of flame he had in the hole, but it blowed up and injured him pretty seriously.

Q. Do you mean some workman in a manhole?

A. Yes, sir.

Q. That happened here in Louisville?

A. Yes, sir.

Q. Do you ever go into a manhole yourself?

A. Yes, sir.

Q. Tell the jury whether or not there is always a hazard of gas in manholes, or may be gas accumulated in manholes?

A. Sure, there may be gas accumulated in manholes. you can be in a manhole working and a main bust close to you, and it would come in a manhole on you.

Q. Mr. Reed, did you on, I believe, October 25, 1955, do any work toward inspection of any manhole covers in the aread of Fourth and Market Street intersection?

A. I did.

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Q. Did you make any inspection of—did you inspect all the manhole covers in the streets in the area from the south line of Main Street to the north line of Jefferson Street—that is, in Fourth Street from the south line of Main Street to the north line of Jefferson Street, and in Market Street from the west line of Third Street to the east line of Fifth Street to determine how many manholes covers there were in the streets

A. Yes, sir.

Q. That would be an area of one square radiating out from the Fourth and Market intersection in each of the four directions of the compass, would it not?

A. Yes, sir.

Q. How many manhole covers are in that area?

A. Seventy-seven.

Q. How many, if any, of those were Western Union manhole covers?

A. Twelve.

Q. Tell the jury whether or not those manhole covers had any holes in the tops?

A. The manholes does have holes in the tops.

Q. Did—

MR. HOBSON: (Interrupting) Now, wait a

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a minute. I think we all agreed on this. I never saw a manhole that didn't have a hole in the top.

Q. How many holes?

A. Four.

Q. Round?

A. Four round holes, and there's—

MR. HOBSON: (Interrupting) Are you talking about manholes or manhole covers?

Q. Manhole covers.

A. Four round holes.

Q. Did you find any sewer covers in that area, sewer manhole covers?

A. Yes, sir.

Q. How many?

A. Ten.

Q. Tell the jury whether or not any or all of those ten sewer manhole covers had holes in the tops?

A. All had holes in the top except one.

Q. How many holes?

A. Well, they ranged in difference from one inch to

two and a half.

Q. In size?

A. In size.

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Q. And how many in number?

A. From sixteen to forty-seven.

Q. Were there any Southern Bell Telephone and Telegraph Company sewer covers in that area, and if so, how many?

A. Eleven.

Q. How many did those—did each of those eleven have holes in the top?

A. They didn't have holes in the top, but they had holes around the rim.

Q. Do you mean the hole was not in the central portion of the cover—

A. (Interrupting) No, sir.

Q. (Continuing)—but was around the circumference?

A. Yes, sir.

Q. How many holes in each cover on those eleven covers?

A. Four.

Q. What was the dimension of those four—each of those four holes?

A. They was about a—about an inch.

Q. What was the—that is an inch, pointing from the edge toward the center?

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Mr. Hobson: Wait a minute. If your Honor please, let the witness testify.

Q. All right. Describe it, if you will, please?

A. It was about an inch deep from the rim, and about—I'll say about an inch and three-quarters, maybe not that much . . .

Q. (Interposing) Along the circumference of the rim?

A. Yes, sir; yes, sir.

Q. Would you describe those holes as being half-moon shaped?

A. They are half-moon shaped.

MR. HOBSON: If Your Honor please, I think it's perfectly obvious that Counsel is leading the witness, and it's not proper. I object to it.

BY THE COURT: Let's not lead the witness.

MR. BLACKWELL: I'm trying to expedite things.

BY THE COURT: I don't agree to that.

Q. Mr. Reed, were each of those four holes in each of those covers holes that went all the way through the cover, or were they stopped up, or just what?

A. They went all the way through the cover.

Q. Now, did the Louisville Gas and Electric Company

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have any manhole covers in this area, that four-square--four-block areas?

A. Yes, sir; they had forty covers.

Q. Were there any holes in those covers?

A. Yes, sir; one hole to the cover.

Q. In each of the forty?

A. Yes, sir.

Q. What was the diameter of that hole?

A. Approximately one inch.

Q. Was it on the outside edge, or was it in toward the center?

A. I'd say it was about five inches in, approximately five inches in from the—from the rim.

Q. Have any plug in it, or rivet in it?

A. No, sir.

Q. Did you see any rivet or plug of any sort in that one-inch hole in any of those forty Louisville Gas and Electric Company manhole covers?

A. No, sir; I did not.

Q. Was there any rivet or plug in that one hole?

A. I did not see any.

Q. Well, was there any?

A. No.

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Q. Did you look to see whether the hole was open or whether it was plugged?

A. I walked up and looked at the holes.

Q. Did you find any manhole covers which you could not identify by the name on the cover, or otherwise?

A. Yes, sir; there's four unknown manholes.

Q. With covers on them?

A. Yes, sir.

Q. Did those four unidentified, or unknown, manhole covers have any holes in the center of the cover?

A. Yeah. They—yes, sir; they had one hole in the center of the cover.

Q. State the dimension of that hole?

A. It was one inch by one and a quarter inch.

Q. That's all, Mr. Reed.

Cross-examination by Mr. Robert P. Hobson

Mr. Hobson: Mr. Reed, the manhole covers for the sewer commission had one hole in the center that was very much like a key hole for the purpose of putting a key in there and turning it and lifting the cover off, wasn't it?

A. I can't answer that—

Q. (Interrupting) You saw that, didn't you?

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A. I saw the hole.

Q. Well, isn't that what it was?

A. Not—not in the sewers.

Q. I'm not talking about in the sewer. I'm talking about in the sewer cap.

A. I'm talking about the sewer cap.

Q. All right. You say you didn't see that?

A. The only sewer caps I seen had anywhere from sixteen to forty-seven holes in them.

Q. And you didn't see any with the hole that I have described to you?

A. No, sir.

Q. And you say that the Louisville Gas and Electric cap in the crosswalk, west crosswalk, at Fourth and Market did not have a plug in it?

A. It did not have a plug in it on october the 25th.

Q. At what time?

A. Oh, somewhere near, I'd say, approximately between ten and noon.

Q. That particular manhole cap is very close to the Western Union office, isn't it? Put it a little bit differently, very close to the main office of the Western Union?

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A. Well, it's—I don't know how close it is to the Western Union office, but—

Q. (Interrupting) Well, it's about eighty feet, isn't it?

A. I wouldn't say that.

Q. Well, you know it's close—so close that you can step from one to the other, don't you?

A. No, sir; I don't know that.

Q. Mr. Reed, do you tell this jury that you don't know how far it is from the west cross-walk over Market Street at Fourth to the Western Union office?

A. No, sir; I do not.

Q. That's all. Thank you.

MR. BLACKWELL: That's all, Mr. Reed.

BY THE COURT: Next witness, please.

(Witness excused.)

MR. VERNE QUINN, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Will you please state your

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name and your place of residence?

MR. QUINN: My name is Verne Quinn (Spelling) V-e-r-n-e Q-u-i-n-n. I live at 1611 Hedden Park in New Albany, Indiana.

Q. What is your profession, Mr. Quinn?

A. I'm employed by the Southern Bell Telephone Company. I have been with them for twenty-eight years, and in that time I have worked in the engineering department primarily, although at times I have worked in the maintename and construction department.

Q. Have you ever worked for the Western Union Telegraph Company?

A. No, sir.

Q. Ever had any business or professional connection with them?

A. Well, they are a communication company similar to the Bell System and have some similar plants and at times I see their people, for that connection, yes.

Q. But you have never been employed by the Western Union?

A. No, sir.

Q. What is your exact title with the Southern Bell Telephone and Telegraph Company?

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A. I'm an engineering supervisor.

Q. In Louisville?

A. Yes, sir.

Q. Does the Southern Bell, alone, or it with any of its

affiliates have manholes as a part of its underground system in Louisville?

A. Oh, yes. We have many manholes in the—

Q. (Interrupting) Can you give us the number of manholes in public streets and alleys in Louisville of the Southern Bell Telephone and Telegraph Company, owned by it?

A. Yes. We have about, approximately, 1150. I believe at the end of last month it was about 1141. There are some additional covers, or manholes which we own jointly, with the American Telephone and Telegraph Company.

Q. About how many of those jointly owned are there?

A. About 230, I think.

Q. That would make a total of about 1380 solely and jointly owned?

A. Yes, sir; approximately.

Q. Why does the Southern Bell and the American Telegraph Company, jointly with the Southern Bell, have those 1308 manholes? Why do you have to have manholes?

A. Well, we need manholes in order to have a

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housing for our underground cables, and to provide a place to join these cables together. Our cables have many wires in them. In fact, one cable, what we call a full-sized cable, the maximum number of wires that would be in its 2⅜ inches diameter, outside diameter, is 4,242 wires. Now, to put that many wires on poles is practically impossible, and if we did have that condition the sky would probably be darkened. And long before I was born, as I—some of the things that I use in my work, I find that the city of Louisville passed an ordinance in 1906 that prohibited the wire-using companies from having overhead structures in a downtown area here in Louisville which they call Area A roughly at that time.

Mr. Hobson: If Your Honor please, are we going into that again?

BY THE COURT: This is—

MR. BLACKWELL: (Interrupting) This is the defendant's case, Your Honor. I think we're entitled to show it. Now, the plaintiff's attorneys have—

BY THE COURT: (Interrupting) It's been established, Mr. Blackwell, by the ordinance being introduced before the jury that this condition exists. This witness, of course, I assume, was not present when that was done. But what we're trying to do is not give any testimony that is

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repetitious unless there is reason, or unless it's controverted. This is not controverted that the telephone company is required in the downtown area to have underground conduits.

MR. BLACKWELL: Well, I think he was just parenthetically mentioning that in explanation of what he was going on to say.

BY THE COURT: Well, let's push along as rapidly as we can and not be repetitious if it can be avoided.

A. I didn't hear the other testimony.

BY THE COURT: I realize that, Mr. Quinn.

A. I was just answering the question.

Q. What—what are these tubes or conduits under ground made of?

A. Well, they are usually terra cotta—that is, baked clay. And we have different types of them. They come in various numbers, either four together, six together, or eight or nine together. And the shape of them will either be a square or rectangle, and the individual ducts themselves, conduits, are about 3⅜ inches across, and they are practically square. The corners are rounded. They come in sections about two or three foot long, and they are joined together with what we call a molder band and those con-

duits are laid in a trench between manholes and they make a continuous run from

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one manhole to the other through which a cable can be pulled. And then the manhole is used as a place to splice the cables or to get access to it.

Q. Do those—do any of those approximately 1380 Southern Bell Telephone manhole covers have any holes in the tops?

A. Yeah, we have holes, various numbers of holes, in the tops of our manholes. The telephone company years ago—well, it's been a consolidation of companies. We have some old covers that have been in back as far as the old Ohio Valley Telephone Company, and some of the Louisville Home Telephone Company and the Cumberland Telephone Company which were combined in 1924 to form the Southern Bell Company, and those companies each had individual covers, and they had some which would differ and vary from what we use today and what we call the standard covers today.

Q. Now, about what percent of the total 1380 manhole covers are of what you describe the standard type?

A. The standard type cover is the cover that is recommended by the Bell System and is used the system over, from coast to coast. In the downtown area of Louisville where—that was here years ago, when you had these other systems you might have a large number of these old covers, but

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over the whole of Louisville where the system has extended like as you grow into St. Matthews and as you grow out into these various areas, those have been built in recent years and those are standard covers. But overall I'd say we have approximately ninety percent of what we call the standard covers.

Q. Do those so-called standard cover manhole covers have any holes in the tops of the covers?

A. Yes, they have the—what the—the lift hole at the periphery of the holes, the circumference. Some have two and some have four. That hole is—well, it's similar to what we have here in front of us. I notice we have one here in front of us on the floor. It's a half-moon out here at the edge of the circumference. And if there's two they are diametrically opposite each other, a line drawn through the center. And if there are four, they are diametrically opposite each other eight or nine inches apart out on the circumference. Those holes are used to insert a tool so that you can go down in the hole, twist it and lift it to pull the cover off, and, of course, being a hole it serves as ventilation to ventilate the hole.

Q. Do those holes around the edge go all the*y* way through so that when the manhole cover is in place, if

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you took this pointer that I have in my hand, it would drop all the way into the manhole?

A. Yes. It goes all the way through; yes, sir.

Q. And what is the size of each of those four holes in each cover of the so-called standard type?

A. Well, measured from the circumference of the hole considered the center, I think it's about an inch. And across, out on the outer edge, it's about an inch and a half—inch and three-eighths, inch and a half, sort of a half-moon arrangement as you see there.

Q. Now, you referred to another ten percent, or some of the manhole covers of some of the old companies which are now consolidated into one telephone system we now have here in Louisville. Where are those located?

A. Those would be located in the downtown area, because you had a congestion of telephones here years ago.

Q. I want us to take a little sample of some of those

old manhole covers that are still in place. Take, for instance, the Louisville Home type manhole cover. How much in diameter is it?

A. Well, the Home company used a little smaller cover than what we do today. Most of their covers were approximately a twenty-four inch cover. It had a twenty-four inch

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minimum opening. The cover is about two inches bigger than that on the outside, because it fits down into a flange so it won't go down in the hole.

Q. Tell the jury whether there were any holes in the top of that cover, that Louisville Home cover?

A. Well, the—the covers that I remember, the Louisville Home Company did have various numbers of holes in them, four, six holes. And the holes, the size of them—oh, I guess they are maybe an inch and a quarter or so in diameter, I would think.

Q. In addition to those four or six holes, did they have any holes around the edge? Do they have any holes around the edge of the cover?

A. Yes, some of them had lift holes in them around the edge.

Q. Now, will you describe to the jury the old Ohio Valley Telephone cover, which is one of the covers in the—one of the old component companies, principally in the downtown area?

A. Yes. We still have some of those old covers in use, and they were a rectangular cover. If I remember right, some of them were made here in Louisville by the Granger Founderies years ago. I think Granger is on the top of the

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cover. And they have a number of holes in them, oh, I think, as high as sixty holes in some covers, and the covers themselves were, oh, approximately thirty inches one way and twenty-six inches the other way.

Q. About what size were each of those sixty holes in each of those old Ohio Valley Telephone type manhole covers?

A. Approximately three-quarters of an inch, I think, to the best of my knowledge.

Q. Does the Southern Bell have any manhole covers in Louisville, to your knowledge, that doesn't have holes, one, two—two or more holes clear through the top of the cover?

A. Well, in my twenty-eight years with the company I think I have seen most of our covers here in Louisville, but—and to the best of my knowledge we don't have any. There might be one isolated some place, but to the best of my knowledge all of them have holes out at the circumference.

Q. That's all.

Cross-examination by Mr. S. J. Stallings

MR. STALLINGS: Mr. Quinn, would you step down here a moment?

MR. QUINN: Yes, sir.

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(Witness leaves witness chair and goes over to Defendant's Exhibit 1.)

Q. Now, did I understand you to say that ninety percent of the covers of the Southern Bell have these half-moon holes, and about four of them?

A. Approximately on the percent. That's just a guess.

Q. Yes, sir. Now, can you see how that half-moon hole is shaped there, or are you familiar with that? Do you notice that that is a bevel? That's beveled, isn't it?

A. That makes the opening all the way into the hole.

Q. Now, this cap has a metal frame that it sets in that sets pretty snug with the exterior of this cap, doesn't it?

A. The—It's probably an eighth of an inch around the cover. They wear from cars hitting them, and once in a

while we have to replace them.

Q. Now, that bevel running into that angle is beveled for the purpose of getting that hook in there, isn't it?

A. Yes. You insert your hook angular out here, and you twist, and you twist the cover to get down under this

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rib. That's a rib there that it's sitting on. And when you get under that rib, then you can lift this up

Q. And the reason it's beveled is so that you can get in underneath it and get away from the frame, isn't it?

A. That bevel lets the hole go through the cover, yes, sir.

Q. Well, if it weren't beveled there, you couldn't get the hook under there, could you? The frame would prevent it, wouldn't it?

A. Well, I've never measured one just to see that that would happen. That might be a condition. I have never measured one.

Q. Well, you say you are an engineer, and you can look at it right there, and you have had twenty-eight years of experience. Now, isn't that the logical conclusion to reach that the reason that's beveled is to get it away from the frame to get under here to hold it?

A. Yes.

Q. All right. How is that frame all the way around the circumference there? How far does that stick out? half an inch?

A. No, it sticks out approximately three-quarters of an inch.

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Q. All right. Have you got a rule?

A. No, sir.

Q. Have you got a scale?

A. No, sir.

Q. Do you mean you're an engineer and don't carry a

scale?

A. I don't know any other engineer that carries a scale with him all the time.

Q. All right. Let's just take this. How far is that indentation in there? You say the frame sits out. Now, you are an engineer, and you are a judge of distance, aren't you? How far is the top of this part of the hole out to the exterior? It's about three-quarters, isn't it?

A. Well, I wouldn't say, because that paper is flexible, and of course it can be pressed into the opening.

Q. Well, get something besides a paper. We'll get a pencil. Now, what do you say? It's not three-quarters, is it?

A. Approximately three-quarters.

Q. All right. Now, you say the frame sets in under here three-quarters don't you?

A. Yes, sir.

Q. All right. Then it necessarily has to be

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beveled in order to get the hook under it, doesn't it?

A. Yes, sir. But I'm talking about those covers, and this is a Western Union cover.

Q. Well, yours are similar to that, aren't they?

A. Well, they look similar to it, but as far as being dimensional to it, I wouldn't say that's true. I couldn't answer that, for I have never compared them.

Q. Now, you say you have got twelve or fifteen hundred of these around the city?

A. Around there, close to fourteen hundred.

Q. Have you got a single cap in the Southern Bell System that's got four holes up here in the middle of it, and, if so, where is it?

A. Yes, we have some of the old Home Company covers. I don't know the location of them, because there are fourteen hundred of them. I couldn't be expected to know the

exact location of each one of those covers. But we do have some old Home covers that have four holes in them, but we might have to hunt the city over to find them.

Q. Do you mean you might have to hunt like a ferret to find one?

A. I might have to.

Q. Well, you know more about it than the jury,

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don't you think? with twenty-eight years of experience there. And didn't you say that that was the rectangular-shaped one?

A. No, sir; the old Ohio Valley is the rectangular-shaped covers.

Q. Well, didn't you say the old rectangular-shaped had the numerous holes in it?

A. Yes, sir.

Q. And aren't they very small holes?

A. They are approximately three-quarters of an inch in diameter.

Q. Now, will you tell this jury a single cap with holes in it in a crosswalk in the city of Louisville, in a crosswalk, now, and, if so, where is it? Now, I'm not talking about down the middle of the top of the cap. Now, tell us where there's one, if there's one?

A. I don't know that I could tell you from here that there is one, or I don't know that there is one.

Q. Well, if you have twenty-eight years experience with the telephone company, do you mean to tell us that there is a single cap in a crosswalk?

A. I mean to tell you that information has no engineering value to me at all.

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Q. Well, you made some preparation to come out here and testify about these caps, didn't you?

A. I never made any preparation other than look at these manhole covers.

Q. Who asked you to come out here?

A. The—Mr. Blackwell.

Q. You went over this thing very carefully with him in minute detail, didn't you?

A. No, not in any minute detail, in a general way.

Q. When?

A. I don't remember the date when Mr. Blackwell came to me. About a week or ten days ago.

Q. Where did you do that?

A. Started out from my office, and we looked at some manhole covers on Fifth Street.

Q. All right. Now, you all looked at some a week ago. Now, tell this jury where there is a single Southern Bell cap that's got four or five, or any, holes in the top of it?

A. I'm not going to tell you, for I don't know where they are.

Q. Are there any?

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A. Well, I couldn't answer that. I'd have to go out and search the city of Louisville and look at fourteen hundred covers to determine that.

Q. Don't you have a regulation of your company that you are not permitted to put a cap with holes in the top of it in a crosswalk where the public walks?

A. We do not.

Q. You are positive about that?

A. I haven't—

Q. (Interrupting) Now, are you positive about that?

A. Yes, sir.

Q. All right. Can you tell us a single cap that you put in a crosswalk in the city of Louisville in the last five years that had holes in the top of it, and, if so, where is it?

A. Well,—

MR. BLACKWELL: (Interrupting) Do you mean in the top or in the center?

MR. STALLINGS: I mean where I said, in the top, and he

heard my question, and I'd like to have an answer.

A. No, I don't know of any in the last five years.

Q. That's all.

(Witness excused.)

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MR. BLACKWELL: Your Honor, the next witness that I'm calling will require a good deal of time. It's a witness—

BY THE COURT: (Interrupting) How many more witnesses do you have?

MR. BLACKWELL: I'll have probably two or three more. I know it's not quite five—it's eight minutes until five, and I didn't want to pull him away from his office where he's quite busy to get him here for just a few minutes.

BY THE COURT: All right. Ladies and gentlemen of the jury, are there any among you that are in riding groups that it would inconvenience considerably if you reported at nine o'clock in the morning instead of our usual 9:30 hour? Are there any among you?

UNIDENTIFIED JUROR: I don't think I could get here by nine o'clock, because my bus don't get here until about 9:10 *of* 9:15.

BY THE COURT: Well, in that event then we'll have to adjourn until tomorrow morning at 9:30. Ladies and gentlemen, I give you the usual admonition that you are not to discuss this case among yourselves, permit it to be talked about in your presence or form any opinion until it has been submitted to you. And in addition, ladies and gentlemen of

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the jury, in this as in all cases the decision that is reached by the jury is to be determined alone from the jury box. Now, there's been considerable testimony introduced in this case about holes in the tops

of these sewer caps, and let's not make any personal investigations. We are going to determine this case from testimony that is introduced here from the witness stand.

Mr. Crier, will you adjourn court until tomorrow morning at 9:30.

(Whereupon, at about the hour of 4:58 p. m. court was adjourned until 9:30 a. m. the following day.)

(Friday, November 4, 1955, 9:30 a. m.)

By the Court: All right. The jury is in the box. Do I understand you have a motion, Mr. Bullitt?

(Off the record discussion between court and counsel.)

By the Court: Ladies and gentlemen of the jury, the counsel have requested about a ten-minute adjournment at this time, and that motion of course is granted. And since you are again seated in the box, I must again give you the admonition that you are not to talk about this case among

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yourselves, permit anyone to discuss it with you or form any opinion until it is finally submitted to you.

Mr. Crier, recess court for fifteen minutes.

(Whereupon, a short recess was taken.)

By the Court: All right, gentlemen, we're ready to proceed.

MR. WILLIAM MARSHALL BULLITT, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows; to-wit:

Direct Examination by Mr. R. Lee Blackwell

Mr. Blackwell: Will you please state your name, age,

residence, occupation and how long you have practiced law?

MR. BULLITT: My name is William Marshall Bullitt. I am nearly eighty-three years old. I'm actually more than eighty-two and a half years old. I live at Oxmoor, which is about two or three miles beyond St. Matthews on the Shelbyville Road, and I have lived there approximately fifty years.

Q. How long have you practiced law?

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A. I have practiced law in this Federal Court, which at that time was at Third and Green Street before they built this building. I have practiced law for nearly sixty-one years. I have practiced in state courts for more than sixty years. I have practiced in the Federal Circuit Court of Appeals at Cincinnati about fifty—well, it's pretty nearly sixty years. It may be—I've forgotten—I can look it up. And—well—nearly sixty-one years in the Federal Court of Appeals at Cincinnati. And then at Third and Green Street.

Q. Your practice included practice in the Supreme Court of the United States?

A. The Supreme Court of the United States, I have practiced there since the 23rd day of October 1899, which is fifty-six years. And I have—if you want to know, I might as well tell you—and I think there is only one lawyer living in the United States who was admitted to the Supreme Court of the United States earlier than I was fifty-six years ago—more than fifty-six years ago.

Q. Mr. Bullitt, have you taken any part in the trial of the case now under trial of Mrs. Sparks against the Western Union Telegraph Company?

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A. I was not here when this case began on yesterday

morning, but I came in about half an hour later, and then I remained here all during the day.

Q. Have you participated in the trial itself?

A. I did not participate, myself, in any part of the trial here before this jury on yesterday.

Q. Just for the jury's information, what was the date that Mrs. Sparks commenced this suit?

A. June 22, 1954, which was a year ago last June, 1955.

Q. Were you Western Union Telegraph Company's attorney or lawyer at that time?

A. Yes. I have been, for quite a while.

Q. Did you prepare this case for trial, or have anything to do with the preparation of it for trial, particularly?

A. I'd have to—it's—not in trial. I referred to it in July and removed the court—the case from the state court to this federal court. That was done, oh, sometime around early July, or sometime in July within the twenty or thirty days that you have a right to remove a case from a state court to a federal court.

Q. Now, what—what other preparation of the

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case did you engage in yourself, personally?

A. All right. I referred it to somebody else in order to take the necessary steps to prepare this case for its ultimate trial, which I knew would come before a jury at some time. I did do that.

Q. Mr. Bullitt—

A. (Interrupting) And except—I was going to say—and I did not do much else at that time, except to know, and to act, on preparing a proper map to show the location of the place where this unfortunate accident occurred to the very nice lady who was hurt, and who brought the suit against the Western Union. I knew that had to be done, and I'll just pass right over it. I did continue doing

that particular thing myself, individually, with the result that that is the map (pointing) that I had the civil engineer to draw, and which I can now state, our adversaries here on the other side, as lawyers, they consented to what was done; that they thought that we could just put it in court and both sides agree to. While they didn't tell me so, I think they told you probably that we would just agree that that map was correct and we'd just both use it.

Q. Mr. Bullitt, did you have occasion in the last days of last May or just before June 1st of this year

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to make—

A. Go ahead; I'm listening.

Q. (Continuing)—to make any study, personally, of the condition and type of manholes somewhere in Fifth Street, and, if so, I wish you would tell the jury where you personally examined the manholes, the area involved, and what you found?

A. That does not state the fact on, or question the fact that I would have to answer. The facts are these; that after I had spent a good deal of time with one of the engineers of Western Union and with one professor of civil engineering in the University of Louisville, which took a lot of time to get things just accurate so that both sides of this case would not have any occasion to complain that the map wasn't right. That was done. Now, that was finished sometime, I should say, about—sometime in January; probably, the latter part of January. That took a lot of time. Then I was plunged into having prepare a very important matter for the Pennsylvania Railroad, and at the same time I was told that I'd have to go to New York and be in bed for a month, two months—didn't know how long—to take out a cataract from my right eye. When I finished this Pennsylvania Railroad matter, then right after that, shortly, I went to

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New York to be put in the New York hospital. They made an operation on my eye and took out the cataract that was at the back of it all, and I was in bed for more than a month.

Now, when I got back out of that, and this is coming to where Mr. Blackwell was referring to—and he was accurate about that—when I got back out of that hospital—that was along about—and back here in Louisville—it was along about the 23rd or 24th of May, there was submitted to me, in writing, a statement by the person to whom I had referred this case for preparation, looking to the time when it would come before some jury for trial, which at that time it was thought would be on May the 12th, but it was postponed from May the 12th on account of my illness to sometime in the fall, and then it was brought up before this particular jury.

When I read that report that had been written out, I saw that that report said that in the—I forget the exact words, I have it here—but in the principal area, or the important parts of Louisville, where there were manholes, that those manholes which had covers such as are put down here—you all saw yesterday—it was said that those manholes and the covers on them did not have holes in them. Now, that was put in writing to me. The minute that I read

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that, I explained to the man who had wrote it, or written it—I explained to him that that could not be true.

MR. HOBSON: Now, if Your Honor please, we object to that statement by Mr. Bullitt and move the Court—

A. (Interrupting) If you don't think that's competent, I can go on and tell just what happened.

MR. HOBSON: Wait just a minute Mr. Bullitt. I accede to most of what you are saying, but there are

some things that just cannot be acceded to.

By the Court: Ladies and gentlemen of the jury, the reference that Mr. Bullitt, and I presume inadvertently, made to his conversation with this engineer of course is hearsay and will not be considered by you.

A. I didn't say it was made to an engineer, if Your Honor please.

By the Court: Well, whoever it was that you were talking to, or whoever made that report to which you refer.

A. That wasn't made to an engineer at all. That was a person to whom I referred—that I told you that I referred the preparation of the case to get ready for trial.

By the Court: Well, any conversation—

A. (Interrupting) All right.

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Q. Mr. Bullitt, after your attention had been directed to that subject, did you personally do anything about it?

A. All right. I apologize for having—I just tried to explain it so you could follow the thing out. But, all right. The day after I read it, I came down here on Sunday, May—I can't remember—I haven't got a calendar here—but it was about May the 26th, or May the 27th. I know it was—I came down on Sunday, which was the last Sunday in May. And I went down to the corner of Fifth and Broadway. I selected Fifth Street, because, being Sunday, I wouldn't run as much risk of automobiles running along on the street and maybe hitting me and putting an end to my life. So I thought that I'd be safer to make an investigation of the manholes and of the covers and of the holes in the covers if I used Fifth Street from the north side of Broadway to the north side of Jefferson Street, which I did. And between three o'clock, or maybe it was half past two—half past two on that Sunday afternoon, which

was a very clear, bright, comfortable in temperature, street, I went into—when I say went into, I don't mean—well, I did have a rod, a great, long steel rod. I didn't have a crowbar, and I had nothing by which I could lift up the

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two-hundred-pound covers on every manhole in the street. But I looked, and took down, on the covers of the manholes, for the full sixty-seven manholes. And I also took down at the same time the names of the owners of those manholes. And by owners of the manholes I mean the very excellent and very well-to-do and very admirable corporations that owns all of those public utilities that had the manholes between Broadway and the north side of Jefferson Street at that time. One—I found and put down—I found on each one of those manholes—the covers of the manholes—there's no writing on the manholes proper; that was, of course, underground—but what you could see on the streets, there was nothing carved onto the manholes, but what was carved, or moulded into all of these covers—and on each one of those manhole covers, the covers being right in the mouth of the manhole, was set out the name of the corporation. I knew every one of the corporations, and the names—the names of the corporation, and as far as I remember, they didn't have anything else there much, except the names of the corporations, and the same kind of thing that you saw in the manhole here yesterday. They are sort of divided by moulding, something of that kind.

But I found this, that the Louisville Gas and

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Company, which has been here, of course, longer than I have and therefore longer than any of you gentlemen have been here—it now goes by the name of Louisville Gas and Electric Company, and they had their names on twenty manholes.

Q. Mr. Bullitt, you referred to the Louisville Gas and Electric Company, Do you mean the Southern Bell Telephone, I believe, for the—

A. (Interrupting) No; I'm talking about just what I said. I'm talking about the Louisville Gas and Electric Company. If I had mistaken in some way the word—whether they call them a little bit differently than that, I apologize. But I know them, and most people know them. When you put it in the telephone, I think that's the way it is.

Now, what about it? I don't want to make a mistake now, but I can't remember everything that goes on. What's the name of them?

Q. Southern Bell Telephone Company, I think, has thirty.

A. Oh, no; that's not right. Go back to your seat. What I'm talking about is Louisville Gas and Electric Company had twenty manholes there. I've got it right here so I can be sure. I was writing this thing up yesterday afternoon from the notes I made at the time. I want to be

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perfectly sure. I don't intend to make mistakes. I made one error when they copied it down here yesterday. I overlooked the first page and took the list down from the second page that I'd had typewritten last June. So I will withdraw my statement that it was the Louisville Gas and Electric Company, and I'll begin now with the correct name. Mr. Blackwell evidently thought that from this.

The Louisville Gas and—the Louisville Gas and Electric Company had, as I say, had twenty manholes. The number of holes that were in each of its covers was set forth here, and that the manholes numbered, twenty of them that they had, and the holes that were in the covers were ninety-five. Now, that was true as to Louisville Gas

and Electric Company, which I saw with my glasses. Their name was at the top, but I caught the wrong cover-sheet here.

Now, I go on with the Southern Bell and Telephone Company. The Southern Bell and Telephone Company had thirty manholes on Fifth Street, right—not in the sidewalks, but right out in the traffic where the automobiles run, and which I kept watching out for all the time. They had twenty manholes. That was the Southern Bell—had thirty manholes, and they had two hundred eleven holes in that thirty manholes. So that, I get right after that first

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page there. The Southern Bell and Telephone Company had thirty manholes, and in the covers on those manholes there were two hundred and eleven holes. And I'll come back later and describe to you—and I'm sorry I delayed you by giving that—by turning at the moment to the wrong page.

Now, I go ahead with Louisville Gas and Electric Company. The Louisville Gas and Electric Company, on the same street, Fifth Street, between Broadway and Jefferson Street, the north side of Jefferson Street, with which you are all familiar, they had—they had twenty manholes only, and those twenty manholes had ninety-five holes in the covers of that twenty manholes that was owned by the Louisville Gas and Electric Company.

This is the next one. Oh, ten manholes. That was on the same street between Broadway and Jefferson. The Louisville Lighting Company had ten manholes, and those ten manholes had forty-eight holes in the covers. Now, the Louisville Lighting Company, which—unless some of you are getting along pretty well in years, you wouldn't know who the Louisville Lighting Company was. The Louisville Lighting Company was corporation here in Louisville that was engaged in the lighting business, and

those days of electric lights and so forth, and I—I know the people—

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I remember who were the rich men in Louisville that owned it. I probably ought to give their names and nobody would mind it. But they were ultimately consolidated either with the Louisville Gas Company, or with the Louisville Gas and Electric Company, and they were a corporation that then went out of business—out of existence. It was rich—

MR. HOBSON: (Interrupting) Your Honor, I'm very sorry to interrupt Mr. Bullitt. Mrs. Sparks is entitled to the orderly trial of her case if I know anything about court procedure. It would be perfectly sufficient for Mr. Bullitt to say that the Louisville Lighting Company was the predecessor of the Louisville Gas and Electric Company or one of the integral parts now making up the Louisville Gas and Electric Company. And I don't think it's proper, and I don't think it's fair to Mrs. Sparks to take up the trial of her case with this sort of, what I can call only a harangue. I am perfectly earnest and serious about it, and I hope I'm duly respectful to Mr. Bullitt.

BY THE COURT: Well, I do think that we should limit our testimony to the exact issues that are presented before the jury that are and should be presented before the jury.

Q. Will you please continue, Mr. Bullitt? You

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have given the Louisville Lighting Company facts, now.

Now, the next corporation or utility who had a manhole or more, will you please state the facts about it?

A. Well, all right. I bow to whatever the Judge says. The Louisville Water Company, which is still in existence

and owned by the city, had one manhole. It had one manhole and that one manhole had only one hole in its cover.

Then the Metropolitan Sewer Company, or Sewer—whatever the actual corporate name is—the Metropolitan had their name on two of the manholes on Fifth Street between Broadway and Jefferson, and they had only three holes on their two manhole covers.

There were two others, two other manholes, that did not have any name of the owner upon them. But they were just as old looking in appearance as all of the rest of them were, and they were only two manholes; but they had—one of them had forty holes in the cover, and the other had thirty-two holes in the cover.

So that those two manholes that did not have any name whatever to identify them—so that they had seventy-two holes in the two manholes covers.

Now, I happen to remember just this, not very clearly,

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but I can remember that I was—undertook to study why would they have seventy-two manholes—seventy-two holes in two manhole covers? I do not, and did not, and do not now have any explanation as to why it was done that way. But the holes were not microscopic by any means. They were very fairly considerable in size of three or four different grades, of which I have made no note in the different grades of how they were bored through. But everything that I have mentioned, and I'm going to mention, that all the holes went right straight through the full thickness of the manhole—of the covers. And I put in the iron rod so as to see how far it was gone in, and it would go in—its length, which is not quite as long as that black pointer there—the pointer is, but, oh, it was at least three to four feet long, and I never could reach any bottom of the hole that went through the covers themselves.

Then there was another one, the Kentucky Electric Com-

pany, was the next one that I wrote down—and I wrote all of them down. They had two separate manholes, with their name on it. One of those manholes had three holes through its cover, and the other one had four holes through its cover, so that the Kentucky Electric Company owned and

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had its name on two manholes, and those two manholes had seven holes in the aggregate, through the covers of the two manholes. Now,—

Q. (Interrupting) Mr. Bullitt,—

A. (Interrupting) I just want to say this. Give a man—I like to finish what I want to say.

The agregate of—the aggregate of the manholes that—that Sunday afternoon that I with my own eyes personally looked at, steered right around them, but not run off by any traffic—I had to step aside quite often until the traffic did get by—but it wasn't very much; it was just an occasional automobile. There was sixty-seven of them. Now then, those sixty-seven manholes had in their sixty-seven covers four hundred and thirty-seven holes.

So that the investigation that I made—and I made the investigation because the person to whom I'd left the preparation of the case for trial was obviously—well, anyway, he put in writing to me that the manholes in the important parts of the city, the central metropolitan areas, didn't have any holes in the covers, and I found sixty-seven manholes on Fifth Street from Broadway to Jefferson Street, sixty-seven manholes with four hundred and thirty-seven holes.

Q. Out of those sixty seven manholes, did you

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find and that did not have any holes in the covers?

A. At the corner of Fifth and Chestnut, or it may be at the corner of Fifth and Walnut, I just don't remember at the moment, there were two manholes that were out from

the—they were pretty close to the southwest corner of that intersection of Fifth Street, with either Walnut or Chestnut. I don't remember which. They stood out diagonally about—oh, I would say, eight or nine feet from the corner, from the southwest corner of the intersection. One of them had—and before I get through I'll see if I can't find the exact amount—one of them had a number of holes. The other one did not have a single hole in the manhole cover. But the written report that was made to me by the person—

MR. HOBSON: (Interrupting) If Your Honor please, may we—

BY THE COURT: (Interrupting) Yes; let's not refer to the written report, Mr. Bullitt.

A. What's that, sir?

BY THE COURT: I say, let's not refer to the written report. Obviously, it would be hearsay.

A. All I want to say is that the written report said that there were no holes, explained by a man—

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BY THE COURT: (Interrupting) Well, we can't testify as to what was contained in the report.

A. All right. I want to be sure. All right. Well all I can say then is, without reporting anything, is what I said. You asked if there were any holes that had no holes in the—any covers, is that right?

A. That's right.

A. All right. One of them did not have any hole in the cover.

Q. How far—

A. (Interrupting) Just a minute. But the adjoining manhole, which was probably three feet away from it—

MR. HOBSON: (Interrupting) Your Honor, doesn't the first part of it answer the question? One did not have any hole in the cover, and we're not interested in the adjoining one, I take it.

BY THE COURT: Well, he may—

MR. HOBSON: (Interrupting) It's not responsive, Your Honor.

BY THE COURT: Well, I'm going to let him answer. I think he already has.

MR. HOBSON: All right.

Q. Go ahead.

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A. It was what looked like a twin manhole, I would say about three feet—might have been four feet, I did not measure the distance between them—there was the other manhole close, no other manholes close at all—had about somewhere from two to four or five holes in its cover.

Q. Now, you have mentioned that out of these sixty-seven manhole covers, sixty-six of them had holes in them of the total number of four hundred thirty-seven holes, is that right?

A. Yes; sixty-seven manholes had in the aggregate four hundred thirty-seven covers—had sixty-seven covers which had four hundred and thirty-seven holes right through all those covers.

Q. Give the jury such information as you have as to the size of those holes, Mr. Bullitt, if you took the size of any of them? You determined the size of any of those four hundred thirty-seven holes?

A. Are you asking me physically to describe to the jury the size and the appearance and the—

Q. Shape.

A. Well, yes; the nature of the size of the four hundred thirty-seven, is that it?

Q. Yes.

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A. Is that it?

Q. That's it.

A. All right. Here's what—not merely my memory,

but I know too much about that. I do know how I can answer that question pretty well, and anybody else can go out there and do the same thing and bring it back. I have to give you this, on not every one, but on almost all of the four hundred thirty-seven holes—is that thing still down there? Your Honor, can I show to the jury the shape of the holes according to that cover that's on the one involved?

BY THE COURT: Yes; all right.

(Witness leaves witness chair and goes to Defendant's Exhibit No. 1.)

A. On almost every cover—I would not be willing to say that it on every cover, but certainly on a great number of the covers there was—if you can follow the little end of that (referring to pointer)—there was cut into the metal cover itself, what all of you would know as practically an equilateral triangle. A piece was cut out all the way down through it that was shaped about like that, and like—

Q. (Interrupting) Do you mean, a V-shape?

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A. A V-shape about like I'm saying, and this—in other words, the hole in almost every one was the shape that is in between my two fingers (indicating V-shape). I'm sure you understand that. In every one of them, that V was not scratched on there, but it had either been initially moulded, or it had been at some time carved down through the whole thickness of this cover. And I didn't do it on every one, but in a great many of them I took the chance of taking—I didn't have this particular rod. I had another rod, a metal rod that was roughly, I'd say, about that long (Indicating), and was about the size uniformly as the end of this is. And I would stick it right down into this thing and it would never stop, it would just go on—well, it may have been five feet, ten feet, fifteen feet, however deep it was. But, still, every one that I tested throughout the

sixty-seven—and remember on some of those covers there were forty holes, some had thirty-two, a number had seventeen, others would have ten, holes right through these big, heavy, thick covers that were there. Does that—

Q. (Interrupting) That answers my question, I think. Did you test any of them with a coin as to size? Did you—

A. (Interrupting) Well, yes; I did. I'll show you

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what I tested. All right. I had some quarters in my pocket, and I went through not every one by any means, but I only took those which had four holes in the same order, about as you see on this particular cover here before your eyes. I would not do it every time, because there were sixty-seven of them. But I suppose in the course of the sixty-seven I would probably stop and try on maybe twelve. I might have tried sixteen or eighteen, I don't know. But I'd always go and put my quarter right down through that hole this way, on its edge. I hated to let it go, because if I would let it go, it would have gone all the way down to the end. I would never have got my quarter back. But I could see that the hole was a little bit, not much, but a little bit bigger than a quarter, and if the quarter was dropped down vertically right down that, it would have gone down that way. And the holes were big enough, and so I saw that it would drop down flat.

Q. Is there anything further than you can add, Mr. Bullitt, or have you completed your testimony on direct examination?

A. Well, I would say this, as near as I can remember it, there are times when some other things around the circumference that were either carved out a little bit—there were some other things around the circumference that

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gas could come up through, because they didn't fit absolutely. I think right here—there's one of them right there.

Q. You are now pointing to—

A. (Interrupting) I'm pointing to the cover of the manhole on which the very nice plaintiff unfortunately fell down and got injured. Now, that is the manhole, and anybody that looks over the side here can see—there, there's the quarter; that shows you there. That quarter fits inside of this thing that's somewhat carved out. So that there were that many more what you might call holes in the cover, don't you see. I don't say they were in every cover, but they were in a great many of them.

Q. All right.

By the Court: Are there any further questions of this witness?

Mr. Blackwell: (To Mr. Hobson) Any cross-examination?

Mr. Hobson: Is the direct examination finished?

By the Court: I say, are there any further questions?

Mr. Hobson: None from us, Your Honor.

Mr. Blackwell: All right, Mr. Bullitt, thank

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you. You have covered all of this, haven't you?

A. I've covered from Broadway to the south side of Jefferson Street, sixty-seven manholes that I investigated.

Mr. Hobson: Your Honor, are we starting over again?

Q. Did you personally investigate other manholes in the area?

A. I certainly did.

Q. Will you state about that, please?

By the Court: Will this be cumulative testimony, Mr. Bullitt? Will this be similar to the testimony you have given regarding these other manholes to which you have already testified? Is this purely cumulative testimony, Mr. Bullitt?

A. Oh, it's another entirely additional—if Mr. Hobson will come up here, and I can say it to you and then you can

make your decision.

BY THE COURT: All right. Will counsel approach the bench?

(Off the record discussion between Court and Counsel.)

BY THE COURT: All right: Let's proceed.

Q. Did you—

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A.. (Interrupting) Give me that little pair—the other pair so I can see something there. This is not good for anything except close reading. (Mr. Blackwell hands eye glasses to witness). The written report that I have already spoken about—

BY THE COURT: Well, let's confine your testimony to any other additi nal investigation you made, Mr. Bullitt, without reference to any written record—or report.

A. That's what I'm going to do, if I may. Then I was furnished with the report that there were nine, I think it was, other manholes—

MR. HOBSON: (Interrupting) If Your Honor please—

BY THE COURT: (Interrupting) Yes. Mr. Bullitt, you didn't understand me—

A. (Interrupting) Let me say it to the Court.

BY THE COURT: Now, you may testify to any other manholes that you personally observed.

A. All right. I'll do it. I'll do it without saying why. All right. Some few days later I very carefully examined nine other manholes in the same vicinity, almost right on the same street, and there I made a very close and

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careful investigation, much more so than I did with the ones I have told you about, to find out—see for myself—just how many holes there were in the covers, although I'd been told there weren't any in this particular nine holes. And I investigated it thoroughly, and I found out that instead of there being no holes in it, there were lots of them.

Q. Where were those nine manholes, just generally?

A. What was that?

Q. Were those nine additional manholes located in the downtown part of Louisville?

A. Oh, they were right within a baseball-throw of the corner of Fifth and Jefferson where my office is.

Q. That's all, Mr. Bullitt.

A. Is that all?

Q. That's all. Thank you.

BY THE COURT: Any further questions of this witness?

MR. HOBSON: Not from us, Your Honor.

BY THE COURT: That's all, Mr. Bullitt. Thank you very much. Next witness, please.

(Witness excused.)

MR. F. W. RUSSELL, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Will you please state your

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name and your place of residence?

MR. RUSSELL: My name is F. W. Russell. I live at 4938 Brownsboro Road.

Q. What is your business, Mr. Russell?

A. I'm with the Louisville Gas and Electric Company.

Q. Are you an officer with that company?

A. Yes; I am vice-president in charge of operations.

Q. Do your official duties with the Louisville Gas and Electric Company include operation of both its gas and electric business?

A. Yes; they do.

Q. How long have you been connected with the Louisville Gas and Electric Company?

A. I joined the company in 1925; just received a thirty-year pin to prove it.

Q. Does the Louisville Gas and Electric Company have many or few manholes with covers on them in the streets and alleys and other public ways in Louisville?

A. There are over one thousand. I don't know the exact number.

Q. Why does the Louisville Gas and Electric Company have manholes as a part of its system?

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A. Principally as access points to the underground electric cables which principally are in the down town area, but also in some of the outlying areas. There is a physical limit to how long a piece of cable can be and how long a piece you can pull into these underground ducts, so at points there have to be these access points, really an underground room. And the access to that room is a cover similar to the one on the floor there (pointing to exhibit).

Q. The Louisville Gas and Electric electric cables then are underneath the surface of the streets in ducts, and these manholes permit your workmen to go down to repair and maintain and otherwise take care of those underground wires, is that correct?

A. That's correct.

Q. Are those underground facility operations a part of the work embraced in your duties as vice-president in charge of operations?

A. Well, in general, that work all comes under the operating department; that's correct.

Q. Mr. Russell, does any kind of gas tend to accumulate in underground ducts such as you have mentioned, or in manholes?

A. Yes; gas gets into these vaults, as we call

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them, that are entered by means of a manhole, from various sources.

Q. What are some of the sources of such gas?

A. Well, of course, we also have a gas distribution system running generally in the same area as the electric system, and there is some slight leakage from that which at times gets into these manholes. Then, below our vaults, are the city sewers, and there's the well-known sewer gas that escapes from the sewers and seeps up through the ground and appears in these vaults. And then, of course, there's the—just nat—I guess it's still called sewer gas, or black damp, where moisture gets in the bottom of a manhole, and there may be some organic matter or dirt and there's additional gas generated by that. I'm not a chemist; I can't identify them all.

Q. Are you familiar with any manholes over the city of Louisville which have holes in the covers of the manholes?

A. Well, it's necessary in most cases to either use a hole or a sort of a bite on the side to remove the covers. They're pretty heavy, and one process of getting them out is to put a hook around the hole in the center and to pull the manhole off its base.

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Q. Do the manhole covers which the Louisville Gas and Electric Company that is scattered through the city Louisville have one or more holes clear down through the top through the cover?

A. I would think most of them do; yes, sir.

Q. What about the size of those holes, Mr. Russell?

A. I've never had the occasion to measure one; but the hooks that the men use to pull them out, I suppose, are made of about half-inch rod, and these holes will accommodate that.

Q. Could you tell the jury whether or not the holes really are large—as large or larger than a twenty-five-cent piece, a quarter?

A. Not from my own knowledge or test; no, sir.

Q. And that hole to which you have referred is located where, in the cover?

A. Well, it could be in various locations.

Q. Generally, where is it?

A. Well, I don't know as I could make a generalization. That's as good an example as any, right there. There are some where it's right in the center, but usually, I would think, most of them are off-center, more like this one.

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Q. More or less like what is identified here as Defendant's Exhibit 1, and you are referring to one of these four holes that's located generally in the center of that Defendant's Exhibit 1?

A. That's right.

Q. In other words, it's inside the circumference rather than on the outside of the circumference of the manhole?

A. I believe most of ours are like that. I would like to explain that I never worked as a mechanic in that particular department, and I am—

Q. (Interrupting) Mr. Russell, if gas should accumulate from either of these, about three, sources that you have mentioned in a manhole, in sufficient quantities, in the proper quantity, is there danger of explosion from that gas?

A. Not as long as nothing disturbs the status of the hole. Now, when our men enter a vault through a manhole, they test for such gas with an approved mine gas testing device, and then under any conditions when they work in that manhole, they set up a motor-driven blower on the surface and pump fresh air into the hole.

Q. Is that because of the danger of accumulations

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of gas being in the hole that would either be poisonous or explosive?

A. Yes; and, of course, to make the hole tenable for the man who is going to work down there. Then, of course, you asked about explosions. Most of the operations that we do in a manhole involve some sort of fire. That is, a gasoline torch to melt solder, or a small blow torch—well, soldering in all phases.

Q. Involves the use of metal tools that might make a spark?

A. Oh, that possible could happen. But it's the torches that I'm thinking of—light bulbs and so forth.

Q. Tell the jury whether or not it is a common and general practice, especially in Louisville, if it differs from the rest of the country, for manhole covers to have holes in them such as the ones you have described that the Louisville Gas and Electric has in its manhole covers? Is it a commonplace practice-

A. I would assume it was, for the simple reason that all those covers have to be removed at times, and there has to be some way to get a hold of them.

Q. Is—you used the word 'assume,' do you mean—you are speaking out of your best knowledge?

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A. That's correct; I've made no search.

Q. Is it a rarity or a common thing to find a manhole that doesn't have any cover in it—a manhole cover that doesn't have any hole in it?

A. Well, I can only speak about our own, in which case they all have to have a hole for the purpose of removing the cover.

Q. I believe that's all, Mr. Russell.

Cross-examination by Mr. S. J. Stallings

MR. STALLINGS: Mr. Russell, I'll ask you if it is a common and accepted practice, and if it has been such for the last ten or fifteen years, with the Louisville Gas and Elec-

tric Company to drop rivets in that one hole that you say is in the Louisville Gas and Electric cap for the purpose of removal in order to protect that from a hazardous condition, especially in crosswalks in Louisville?

MR. RUSSELL: There have been a great many of those treated that way. Mr. Jaegle, who was superintendent of the underground system until very recently, initiated that practice something over fifteen years ago.

Q. And is it now a common and accepted practice of the Louisville Gas and Electric Company, and a policy of that company, to put those rivets in that hole in that cap

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belonging to Louisville Gas and Electric Company?

A. Yes; there are such instructions in the underground department.

Q. And that has been a policy of that company for some fifteen years?

A. In general; I think that's correct. I haven't—

Q. (Interrupting) Now, Mr. Russell, from your knowledge of the gas that might accumulate in a vault over which a cap such as this sits, would one or two or three or four holes such as in this hole—in this cap, Defendant's Exhibit No. 1, afford, or accommodate, the release or sufficient gas, if there was gas of any quantity in that vault, to relieve the situation?

A. In our practice, we don't depend on any natural ventilation to have a workman assume that that hole is safe. Now, some of these gases as I mentioned—again, not as a chemist—are heavier than air, so they stay in the vault, regardless. City gas, on the other hand, such as you use in your home, is lighter than air and would escape. It would escape around the rim of a hole. But, again, as I mentioned, we test with a safety light, and then ventilate with a blower.

Q. But the type of gas that you are talking about that would normally accumulate in a vault underneath a street

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is heavier, or lighter, than air?

A. Well, there are both kinds. The sewer gas in a great many cases is heavier than air, and automobile exhaust fumes are heavier than air. But by our franchise, our city gas has to be lighter than air.

Q. But these heavier gases that you talk about accumulating in vaults underneath the street being heavier than air, what effect then would that have? Would air stay on top of it, or would it come up on top of the air?

A. Oh, no; it would go to the bottom of the hole.

Q. And then these would afford, or would not accommodate the escape of any such gas out of that hole, would it?

A. No; not in that case.

Q. Do you know anything about—at all—about the construction of a cap of this character?

A. Well,—

Q. (Interrupting) Or do you know who makes these things?

A. They are bought from various sources. I think most iron foundries make them at one time or another. We take bids on ours, and I just don't know what the sources are.

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Q. From your experience as an engineer and operating as vice-president of the gas company, can you tell us what that is? Is that cast iron?

A. All of ours are cast iron.

Q. But you don't know what that particular one is?

A. No; I don't.

Q. Now, around the edge of that cap where it fits into the collar, or the thing that supports it, does that afford

any escape of any air or gas?

A. Yes, there probably would be, because they don't fit tightly, and they are not machined, usually. I mean, some are slightly warped. I think everybody's run over one at some time or another with a car and heard them clang.

Q. Now, does water likewise run down around the edges of those, into the vaults?

A. Yes; sir; yes, it does.

Q. Mr. Russell, I hate to ask you to do this, but I'm going to do it. There's a—I happen to know that there is a Louisville Gas and Electric cap in the crosswalk at the southwest corner of 6th and Broadway, and it's in the crosswalk as you cross 6th Street. It's the south

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crosswalk of Broadway. There's twenty or twenty-one rivets. Would you be kind enough to go down there to that corner, borrow out of your cap four rivets and bring them up here?

By the Court: Mr. Russell, that is merely a request, and you may or may not comply with it. It's entirely personal with you, sir.

A. It's perfectly all right with me.

Mr. Stallings: All right.

Mr. Blackwell: Quite satisfactory, Your Honor.

By the Court: Any other questions?

Mr. Stallings: No; that's all with Mr. Russell. And if he returns with those rivets—

Mr. Blackwell: Are you going to post a guard on those holes while they are out?

Mr. Stallings: Well, the rivets belong to him.

By the Court: Any further questions?

Mr. Stallings: That's all for Mr. Russell.

Mr. Blackwell: Has he gone down?

MR. STALLINGS: He said he was going. Do you have another witness?

MR. BLACKWELL: No; I'd rather await Mr.

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Russell's return. He'll be here in just a moment, I suppose.

BY THE COURT: If we have any other witnesses, Mr. Blackwell, let's put them on at this time.

(Mr. Russell returns to witness stand, and Mr. Stallings continues cross-examination.)

MR. STALLINGS: Now, Mr. Russell, you were kind enough to go down and get four of those rivets that you referred to, and I see them lying here on this cap. Are these the four rivets that you brought?

MR. RUSSELL: Yes, sir; from the manhole you mentioned.

Q. I see these rivets fit in these holes rather loose. Do you know whether the holes in your cap is the—are the same size, or whether they are smaller?

A. I'd say approximately the same. Those things vary some.

Q. Would you step over here just a minute, now?

(Witness goes over to Defendant's Exhibit No. 1 which has been raised up on its edge by by Mr. Stallings)

Q. Is that the way she looks underneath when you drop your rivets in?

A. Yes; I think they are all about the same

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thickness.

Q. Now, Mr. Russell, can you look at this cap here and tell from its use about where the frame collar fits up against this? Is there a mark or anything to indicate here?

A. Well, there seems to be a little ridge here that shows wear. I would guess, right about here.

Q. Does that indicate to you then that the collar that this fits in, or the framework that supports the—

A. (Interrupting) Yes; that's the point of contact, certainly.

Q. Yes, sir. All right. You may resume your seat.

(Witness returns to witness stand.)

Q. Now, I'll give you back your rivets. And thank you very much. That's all.

Redirect Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Mr. Russell—

MR. RUSSELL: Yes?

Q. —during the past fifteen years, has the Louisville Gas and Electric Company bought any new manhole covers?

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A. I'm sure we have.

Q. Have holes in them when you buy them?

A. Usually not. In those castings—I didn't look at this one when we had it over, but there are indents cast into them so that when they are put in use a mechanic can take a hammer and break out a hole that he may need.

Q. Tell the jury—

A. (Interrupting) Now, that is—

Q. (Continuing) —how many holes were in the Louisville Gas and Electric manhole cover out of which you have removed the four rivets that you have just presented in court?

A. I couldn't tell you. I didn't count them.

Q. There were many holes, weren't there? Many more than four holes?

A. Oh, yes; there were several times four, I guess.

Q. Why had the Louisville Gas and Electric Company made so many holes in that cover initially?

A. I couldn't answer that one.

Q. Well, it had many more—

A. (Interrupting) That's right.

Q. (Continuing) — than four open holes, didn't

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it, when it was put in place?

A. Well, I don't know about that. That particular one certainly has more than four now; yes, sir.

Q. The rivets to which you refer, of course, can easily be lifted out of the covers of the Louisville Gas and Electric?

A. Unfortunately, yes; that's true.

Q. Some child, or any other person passing along a street could lift one out with his fingers?

A. That's correct.

Q. Now, is it or not a fact that the Louisville Gas and Electric Company still has many manhole covers in public street and alleys with holes in the tops of those covers in which no rivets have been placed?

A. I would say there are a good many; that's right.

Q. That's all.

Recross-examination by Mr. S. J. Stallings

Mr. Stallings: One more question. Now, Mr. Russell, I understood you to say that normally the cap comes solid?

Mr. Russell: That's my information.

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Q. And they have what you might call a knock-out plug?

A. That's right.

Q. And then the buyer knocks out the number of plugs that he desires to, or holes that he desires to have?

A. That's been our practice lately. Now, I'm sure that there may have been some bought years ago that were different.

Q. Well, will you step over here?

(Witness leaves witness stand and goes over to Defendant's Exhibit No. 1.)

Q. Do these—and you say they are indented, and the purpose of the indentation is to make them so they'll knock out?

A. From the underside, they are indented. In other words, see, that is a full inch thick there.

Q. Yes. Well, but the modern cap comes solid, and you knock out whatever you want?

A. That's the type we have been purchasing lately.

Q. That's all.

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Redirect Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: There are many other types which are not susceptible of knocking out a plug, are there not?

MR. RUSSELL: I assume there are; yes, sir.

Q. That's all, Mr. Russell.

MR. STALLINGS: That's all. *That* you, Mr. Russell.

BY THE COURT: Next witness, please.

(Witness excused.)

MR. W. F. MARKLEY, called as a witness on behalf of the defendant, after first being duly sworn, testified as follows, to-wit:

Direct Examination by Mr. R. Lee Blackwell

MR. BLACKWELL: Will you please state your name and place of residence?

MR. MARKLEY: Name is William F. Markley. Residence, Ridgewood, New Jersey.

Q. How old are you, Mr. Markley?

A. Sixty-one.

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Q. What is your profession?

A. Mechanical engineer, by education.

Q. What position do you presently hold?

A. At the present time officially known as the Assistant Lines Engineer of the Western Union Telegraph Company.

Q. How long have you been connected with Western Union Telegraph Company?

A. I have been connected with Western Union since about May, 1917—about thirty-eight years.

Q. Mr. Markley, I'm going to interrogate you on some matters which relate to simple facts in this case, but on some matters which relate to expert knowledge of an engineer which you may or may not have. I want you at this point to state your educational training for, and your experience as, a mechanical engineer, including, but not exclusive of, the designing and specifications for manhole frames and covers, also including, but not exclusively, the—any studies which you have made in connection with manhole frames and manhole covers of a national scope. You might start with your initial education as an engineer.

A. Well, I graduated from Stevens Institute of Technology in Hoboken in 1917 with a degree of Mechanical

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Engineer. Subsequently I studied metallurgy at the Brooklyn Polytechnic Institute in Brooklyn, New York. My initial employment with We tern Union started, as I say, in May, 1917, after my graduation from Stevens Institute, and immediately I was placed in what was then known as the Construction Engineering Department, but currently known as Engineering Lines Department. Now, in the Construction Engineering Department there has been the job of developing all the major specifications employed throughout the entire plant of Western Union in the United States for their outside plants which comprises of pole lines, materials, tools and the methods of installation of pole lines, the depth of setting off the poles, the stringing of the wires, the type of guys, the specifications for the materials themselves, and the methods of constructing these lines. The

same applies also to its jurisdiction over all underground plants which entails the selection of the conduits, the installation of the conduits, the lengths of the runs of the conduits, the methods of getting the conduits, the building of the manholes, the types of cover to be employed, whether with vents or without vents, the thickness of the metal of these covers, and the design of the frames and covers in their entirety. My initial work with Western Union was to consider

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standardization in our company of material used in the outside plants for both pole lines and for underground systems. And from the very early days I was doing development work connected with manhole frames and covers, as well as other types of materials used in our outside plants.

Q. Has your experience included comprehensively matters in relation to underground plants that are not specifically related to underground plants, but including in that thermoplastic—

A. (Interrupting) Yes, sir.

Q. (Continuing)—insulation work and the like?

A. My work continued on, as I started to say, developing these various materials, and later it was enlarged in scope to cover the construction methods involved for these materials, and so that in 1941 I was appointed Assistant to the Lines Engineer, and two years later was made my present—was given my present title of Assistant Lines Engineer, which is the second in charge of the development of specifications and construction methods for all of our outside plant, whether aerially or whether in the ground.

Now, in 1947, I was, received a request from the Minister of Post and Telegraph of Colombia, South America, to be a member of a five-man engineering commission from the

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United States to visit Colombia and make an extensive survey of their main trunk telephone and telegraph systems. This—with the consent of my company, I did this, and we came back and made a very extensive report. While over there we covered many miles through the rugged Andes Mountains by car inspecting the lines. We flew over many miles of territory, because in parts we traveled fast. But in our work was large cities and mountains and inspecting inside central offices, and a very complete report was written on this phase of that type of investigation. Later, in 1951, by reason of my rather wide knowledge of metallurgy, which is the study of the micro construction of metals and chemical composition of metals, I was appointed American conferee by the American Society for Metals to attend the, what was called, the First World Metallurgical Congress that was held in Detroit, as I said, in 1951. At this conference there were technical representatives from almost every nation in Europe, from nations in South America, from nations in the Far East and from Canada. At this Congress I was asked to adress the session and discuss the durability and performance in outdoor service of various types of metals and their alloys. This, I did. For that work I received a written citation from the American Society for Metals. And then at the present time

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I am the official technical representative of Western Union on many technical committees on national organizations—for the American Society for Testing Materials, whose job is to prepare specification of all kinds for materials whereby the user can refer to these specifications as a basis for purchasing. For instance, if any of you ladies and gentlemen of the jury had a farm and you bought some fencing, on the fencing you saw a tag which said "Manufactured in Accordance with A.S.T.M."—the American Society of

Testing Materials—you can be sure that you have a very high grade commercial product.

Now, as official technical representative of Western Union I was placed on various committees. On one I was the First Vice-Chairman of the Technical Committee on Corrosion of Iron and Steel. I was on the Advisory Board of the Jones Committee on Corrosion. I was on the Advisory Committee of a technical committee dealing with bare electrical conductors. A member of many of the committees dealing with insulated wires and cables. Also, in view of my experience, I was appointed by Western Union to represent the Telegraph Company on various technical committees of the American Standards Association. This association varies a little bit from the A.S.T.M., or the American Society for Testing Materials, in

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that their technical committees have to be sponsored by certain bodies. I can explain this later. One of these in particular refers to manhole frames and covers, which is the very thing we are talking about here.

Q. Were you a member of that committee?

A. Yes, sir.

Q. What was the purpose of that committee of the American Standards Association?

A. Well, I shall read what was given in the fall—Specifications—I might start out by saying that there was a Steering Committee appointed at the request of the Bell System, the United States Association of Independent Telephone Companies and Society of Civil Engineers to establish a technical committee to work out some national specifications that the average user could use in purchasing manhole frames and covers in view of the fact that there were so many different standards of covers in force at that time. That was just prior to 1940-'41.

Q. Now, were you on that committee?

A. I was on that committee. I was appointed on that committee as an official representative of the so-called "telegraph interests" which comprised at that time both Western Union and the Postal Telegraph Company.

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Q. Will you please at this point state who were—state what other organizations or professional societies and so forth were represented on that committee with you to design, to prepare, national designs and specifications for manhole frames and covers?

A. Well, the various organizations that were represented on this particular committee were about as follows: The American Electrical Railway Association, The American Electric The American Foundrymens Association, The American Gas Association, The American Railway Association, The American Society for Civil Engineers, The American Society for Mechanical Engineers, The American Society for Municipal Engineers, The American Society for Testing Materials, The American Water Works Association, The Canadian Engineering Standards Association, The Electric Light and Power Industry, Telegraph Industry, Telephone Industry, Gray Iron Founders Society, Malleable Iron Research Institute, National Electrical Manufacturers Association, National Founders Association, National Safe Walkway Surface Code Commission, New England Water Works Association, Steel Founders Society of America, United States Department of Commerce for the Bureau of Standards, United States Department of Commerce for the Division of Simplified Practice. I think

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that very completely covers the representation of these various organizations. Some of these organizations have two or three representatives, others may have had one.

Q. And working out through this committee, The Na-

tional Designs and Specifications for Manhole Frames and Covers, were you constantly brought in touch with the representatives of these various associations and organizations?

A. That's right. All of these committee meetings, the discussions would center around the standards being used by the various utilities, the water works and the power companies and the gas companies, telephone industry, what type of manhole frames and covers they used, whether they are round or square, whether they are efficient, were they hazardous, whether holes or no holes in them, did we need holes. Those were broad discussions that took a long while, and I think these specifications as finally developed and issued in 1941 called A.S.A. Specification A-35 took in consideration all these discussions both by manufacturers of manhole frames and covers and by consumers of manhole frames and covers, and in the forward of these specifications there was this statement which I would like to quote—

MR. HOBSON: (Interrupting) Your Honor, may I at this time check my own hearing? (To the witness)

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did you say that was 1941?

A. 1941.

MR. HOBSON: Thank you, sir.

A. In the forward to these national specifications it is stated, I quote, "The committee found that the reasons for undertaking the standardization of manhole frames and covers were economic ones, as there was no complaint that existing designs did not satisfactorily meet the requirements of the various services. The manufacturers engaged in producing manhole frames and covers claim that there was an unnecessary—necessarily large number of slight variations in dimension which increased the stock of patterns and the cost of manufacturing and that there

were no standards that could be adopted by either the manufacturers or users who might not have their own design.

Now, these specifications as they were finally issued covered only round covers, round as you see there in Defense Exhibit Number 1. And the reason for this was that round cover requires the least amount of metal per unit of opening of the cover. That was one reason. Another reason is a round cover is much more easy to handle than a square or rectangular cover. Another reason is that it cannot fall into a manhole like a square or rectangular cover.

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Another reason is economics, that the undersurface where the cover rests on the frame must be machined to provide a smooth fit that won't rock and move with the traffic, and it's much easier to machine such a surface on a round cover than it would be on a rectangular cover. There was one other reason I think that was brought out. It was the fact that with the absence of corners the covers were much less breakable. In other words, if you had a cover standing up, and it was a square cover, and it happened to fall over onto a piece of brick it might snap the edge off of it, where with a round cover you wouldn't have that situation exist.

Q. Mr. Markley, as a result of the studies of the representatives of all those various associations and organizations, did this technical committee arrive at any conclusions with reference to national specifications for manhole frames and for the covers, particularly with respect to those covers having vent holes in the covers?

A. Yes, they did. There were very long tedious discussions on the efficiency of vent holes.

Mr. Hobson: If Your Honor please, may we have the result without the long and tedious discussions?

The witness was asked if they arrived at a conclusion.

A. They did, yes.

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MR. HOBSON: All right. Let's get along, if we may.

BY THE COURT: Let's make our answer—

Q. (Interrupting) Why was the subject of vent openings in covers one that the committee considered?

A. Well, it was considered because there were covers in service, the great majority of which had vent holes. There were a great majority that had no vent holes in the covers.

Q. Well, now, did the committee arrive at any conclusions as to why it was or was not important to have vent holes?

A. Yes, the committee arrived at the conclusion that it was important to have vent holes, and all their drawings for covers showed the existence of vent holes. I must say that in the text of the specifications there is a statement that the vent holes are optional. If the user so desires, he can order the covers manufactured without vent holes.

Q. Why must there be vent holes? That's what I'm getting at.

A. Well, the reason for vent holes, I think a lot of tests brought out, is to provide for the release of

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various types of gases that collect in manholes.

Q. What are those types of gases?

A. Now, th types of gases, I think I might mention, that these types of gases in manholes have been pretty well established by the Bureau of Mines, the Federal Bureau of Mines, whose personnel comprises chemists, metallurgists, physicists, mining engineers and technologists of all kinds.

Q. Is that an agency of the United States government?

A. It is, yes.

Q. Proceed, please?

A. Now, in Boston they had some very bad explosion due to the gas—

MR. HOBSON: (Interrupting) If Your Honor please, are we going to Boston now and try the cause of the explosions?

A. No, I'm only going to say this, that because of these explosions the utilities in Boston requested the Bureau of Mines to make a study of gases in manholes. The—

MR. HOBSON: (Interrupting) If Your Honor please—

A. (Continuing)—the only authority—

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MR. HOBSON: (Interrupting) Wait just a minute, if you please. Addressing myself to the Court—

A. (Interrupting) I'm sorry.

MR. HOBSON: (Continuing)—if I understand the subject of the interrogation of this witness, it deals with the presence of gases in a manhole, and the related question of the efficiency of holes in a manhole cover to release those gases. Now, I don't see how the explosions in Boston could have any effect upon that at all.

MR. BLACKWELL: The witness is preparing to state a study made by the Federal Bureau of Mines in Boston, a technical study made, that will throw a great deal of light on the very problems involved in the suit we have here which you have brought, Mr. Hobson.

BY THE COURT: Mr. Markley—

A. Yes, sir?

BY THE COURT: The answers of all witnesses of course must be responsive to the questions that are asked, and of course I realize that this is a case of a

person, who is qualified such as you are, expressing his opinion as an expert. At the same time, let's keep it within bounds and make it just as responsive to the question as possible without too much elaboration—no more than is necessary to

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explain the answer.

A. I shall.

Q. Will you proceed to state the findings of the studies made by the United States Bureau of Mines?

A. The finding made by the studies of the Bureau of Mines on gases in manholes was extended on a period from 1931 to 1940 and on which their published reports showed that in general there are three main types of gases that collect in manholes. One is the combustible type of gas which, as we mentioned before here, that they come from leakage and from gas mains in which there is natural gas or artificial gas. They also come from gasoline wastes and storage tanks of maybe some leakage into the ground. Then there is the second type of gases known as soil gases. Now, soil gases—I'd like to give you this rather accurately—as indicated by the Bureau of Mines, said that these gases come primarily from decay of vegatable and organic matter and that while these gases have some methane, which is an explosive type of gas, they contain primarily carbon monoxide and are extremely low in oxygen. In other words, these gases are the so-called asphyxiative type of gas. And the third type of gas that they describe is the so-called sewer gases which their study and tests indicated contained considerable amounts

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of methane, a very explosive type gas, and quantities of carbon monoxide and hydrogen sulfide, both of which are toxic and extremely poisonous.

Now, then they carried on tests to determine the efficiency of vents in manholes; in other words, holes in the cover. And I can state briefly that they made rather extensive tests in which they had manhole covers that were equipped with vent holes from .75 to .81 inches in diameter, which is about three-quarters of the size of the holes you see there (indicating Defendant's Exhibit #1). The test showed that three such holes provided 2.4 air discharges per day in an average size manhole which is five feet in diameter and six feet high. Six vent holes provided 2.6 changes per day. Twelve vent holes, 4.3 changes. Twenty-four holes provided 5.5 changes, and forty-eight vent holes provided 11.3 per day. They found that in all cases increase in the number of holes increased the amount of ventilation but not exactly in direct proportion to the number of holes.

Then they tested other factors. They found that other factors affected ventilation—temperature in the manhole, atmosphere, the outside temperature of the air outside of the manhole, the changes in barometric pressure, the time of the year—certain times of the year there's

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more ventilation than other times of the year—the humidity, and, more particularly, wind. They found out that if you change the wind velocity across a manhole from zero to ten miles per hour that the amount of ventilation in the manhole increased fifty percent.

Q. But basically the rapidity of the change of the vapors in the manhole is substantially in proportion to the number of vents in the manhole cover?

A. Yes, I should say so, yes.

Q. Are you familiar with the Western Union Telegraph Company's designs of manholes and number of manholes it has scattered throughout the United States?

A. Yes, I am.

Q. How many manholes with covers on them does the Western Union Telegraph Company have throughout the United States?

A. Throughout the United States we have approximately fourteen thousand manholes and associated covers.

Q. How many manholes with associated covers does Western Union have in the city of Louisville?

A. In the city of Louisville They have approximately one hundred fifty-one, I think.

Q. Only about one hundred fifty-one?

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A. That's right.

Q. I want you to state the results of studies or conclusions from time to time with which you are familiar, or have knowledge, of Western Union's own experiences with manholes and the venting of manholes in it's own practices?

A. Well, we, as I say, operate all over the United States, and use largely manholes with vents, the present standard being four vent holes about the size of a quarter, as was mentioned. Now, there are in the United States many cities, and I believe some state ordinances, which require the use of manhole covers with vents.

MR. HOBSON: We object to this and move Your Honor to direct the jury not to consider it.

MR. BLACKWELL: Your Honor, I think it is entirely—

BY THE COURT: (Interrupting) Well, I'm going to let him testify. Of course, what we are concerned with here is the construction of this particular manhole cover.

A. Well, I can name a few of these cities that require manholes with vents. For instance, Montgomery, Alabama; Birmingham, Alabama; Jackson, Mississippi; Okla-

homa City, Oklahoma; Omaha, Nebraska. In many cities it's almost

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impossible to get a permit to install manholes and covers unless it is stated to the city commissioners that the covers will have vents, even though there are no ordinances requiring vents. I must be frank, and I say that we have some covers, very small number, that do not have vents. There are occasions where you may not want vents for a very good reason, and the primary reason being sometimes manholes in a location may be in a low part of the town and there is considerable wash in heavy weather of rain water and mud and dirt, and in those sections we will—if we can—get permission to put in a manhole cover without vents of any kind just to keep out this dirt and wash out of the manhole. There are other manholes in that conduit line which have vents, so apparently we get enough ventilation from the other manholes to take care of the occasional one which may not have any vents.

Q. What is the present standard manhole cover, if any, of the Western Union throughout the United States? Standard use, general use?

A. Well, the present standard cover by Western Union for city streets and congested areas where you have heavy vehicular traffic is the cover of the type represented by this Exhibit 1 of the Defense. This is a cast iron cover weighing between two hundred and twenty-five and two hundred

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and seventy-five pounds. It has normally four vent holes in the top surface as shown here, about one inch in diameter. And they are designed with cross-ribbing underneath to take very heavy loads and distribute the loads more uniformly in all radial directions. That is our standard cover and has been our standard for many years, and it is in con-

formity with the national standard of the American Standards Association which shows four vent holes in the cover designs that they have established in their specifications.

Q. Has Western Union at some previous time undertaken to establish a standard cover which had fewer than four vent holes?

A. Yes, we have. We have done that. I have investigated our records on these manhole covers, because of this particular case, going back as far as 1909 when our records show this—this original manhole on which this cover was located—was built—

Q. (Interrupting) Do you mean the original manhole on the cover of which Mrs. Sparks fell—

A. (Interrupting) Yes, that's right.

Q. (Continuing)—was built in 1909?

A. The original manhole was built in 1909 with a twenty-four inch hole. The present opening is twenty-seven

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inches. But in 1909 it was built with a twenty-four inch opening and had a cover that measured about twenty-five and a half inches to allow for the seat of the cover on the frame, and it had ten holes one inch in diameter around the top surface of the cover. In 1914 we changed from the twenty-four inch opening, clear opening in the manhole, to a twenty-seven inch opening, which is the one confined by this cover. And so that cover measured about twenty-eight and a half inches to allow for the seating of the cover on the frame. And at that time in 1914 we provided twelve holes instead of ten of the twenty-four inch opening cover, all one inch in diameter. Then in 1920 we cut down these number of covers. We found that we had—

Q. (Interrupting) Do you mean, the number of the holes?

A. Number of holes in the cover. We found that we had an excess of wash and dirt in the manholes and we

figured we could probably get away with fewer holes, so we went to one hole in the center and one inch in diameter and no other holes except the lift hole on the side to give some ventilation. We found that this was exteremely inadequate.

Q. For what?

A. Extremely adequate to permit the gases to

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escape that are normally found in the manholes. We found that the one inch in the center, we didn't feel was adequate.

Q. Was or was not adequate?

A. Was not adequate.

Q. Was not adequate?

A. So the next year was changed to four holes one inch in diameter which has been our standard ever since. This cover and the frame which provides the twenty-seven inch opening, from our records, was installed along about '27.

Q. 1927?

A. 1927; yes, sir.

Q. That is, the Defendant's Exhibit 1?

A. That is Defendant's Exhibit Number 1 cover, yes. And that is our present standard, has been since that time.

Q. Based upon your studies, your experience, your knowledge on the subject of the use of vent holes in manhole covers all over the United States, have you an opinion with respect to the necessity or lack of necessity of providing holes in the tops of manhole covers for ventilation?

A. I think our experience has shown that it's very desirable to have these holes in the top of manhole covers.

Q. Without these holes what are some of the possibilities?

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A. Well, without these holes you could accumulate some of these very highly explosive gases that would blow

the cover sky high in the air. You can have a serious fire generate in there by reason of sparks that might occur, for instance, from traffic over a manhole. These manholes move all time. They wear unevenly and at times have to be replaced because the seat is so worn that the cover will clank, and sparks could ignite the combustible gases that cause a fire which would be very damaging to any equipment or service in the manhole.

Q. Are any of these gases of such a quality or quantity that you might get an explosion by a spontaneous explosion method?

A. Yes. As reported by the Bureau of Mines, they claim the gases do form that can explode spontaneously.

Q. Now, based upon your same studies, information and knowledge covering all the United States, state to the jury whether or not there is any general practice of providing openings for ventilation in the covers on manhole frames throughout the entire United States?

A. Do you mean by Western Union?

Q. By all people with such underground facilities?

A. Well, I think that it is pretty much the general

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policy of most ultilities throughout the United States to employ covers with vent holes, and invariably they are much greater in number, and frequently much larger in size, than is shown in this Defense Exhibit Number 1. For instance, you take the—the Power Company in New York which has some thirteen thousand manhole covers for the primary cables. All but about seventy-five of them have these vents that are twenty-four in number and one and one-half inches in diameter.

Q. How much in diameter?

A. One and one-half inch.

Q. Each of those twenty-four?

A. Each one, one and one-half inch in diameter. They

have in Manhattan, in the Bronx, they have some five thousand. Practically all of them have the same vents in the tops of the covers. They have many openings for secondary cables, thousands of them, which also have the same vents in these covers. The Water Department has a large, rectangular hole, maybe two by three inches, that almost take up the whole surface of the covers. The Fire Department in New York, for their high pressure water system, has holes that are similar to the Consolidated Edison. They measure one and one-half inches in diameter and run about six in number—their covers are usually small in size. And also in the

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Sewer System they have many covers that have long slots that will measure one by twelve inches and running up to twenty-four such slots in the cover. The Subway System in New York has gratings on the sidewalk—the sidewalks are five or six feet wide—where one-third of the width is taken up by sidewalk gratings where the holes are criss-crossed and measure one by three inches, the whole length of the block. And I think Western Union are very conservative in the number and size of their holes compared with other utilities around the countryside. I think that general policy in New York of the utilities is quite prevalent throughout the entire United States.

Q. Based upon your studies, technical investigation, when on this—serving on this technical committee that you have described, upon your own experience, please tell the jury whether or not—and I'm referring to your knowledge all over the country—please tell the jury whether or not it is, in your opinion—may I change that a little?—please tell the jury whether or not the provision of a cover on a manhole in a public street with four holes like the four holes in the center portion of Defendant's Exhibit 1, holes of that size, create any unreasonable hazardous condition

for public travel over the streets by traffic or pedestrians?

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MR. HOBSON: To which the plaintiff objects, Your Honor, on the grounds that this is the question that the jury will answer and is not a proper question for an expert witness.

MR. BLACKWELL: This witness has made a study of that, and just like a jury may have to determine whether someone has a broken bone, a physician can give an opinion on it.

BY THE COURT: Well, ladies and gentlemen of the jury, of course, the response to this question will be an opinion and a conclusion of this witness, and you will so weigh it as a part of his testimony. He may answer.

A. Well, I might answer that question this way, that if you figure the area of these four holes in this Devendant's Exhibit Number 1 you will arrive at an area of 3.1 inches, which is something about that size (indicating). If you calculate the area of the entire cover, you will arrive at a figure of about six hundred fifty square inches. In other words, the ratio is about three to six hundred fifty, or approximately one to two hundred. On that basis, you could assume that the chances of a person walking—a normal person walking across this manhole time after time that it would be one chance in two hundred that his heel would catch in one

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of these holes. Now, the ratio is even greater than that, because we have in the United States some fourteen thousand such manhole covers all located in strategic areas in busy sections of large cities, and this is the first case that has ever come to our attention where there has ever been a complaint or major injury to a pedestrain. So, if you

figure the fourteen thousand manholes and multiply this by the number of hundreds of thousands of people walking back and forth over them from day to day, you might arrive at something like one chance in a million, or perhaps greater than that, of a person getting a heel caught in one of these covers. That is the only way I can answer that question. From that standpoint, you can assume that there would be an extremely small hazard involved in the four holes of one inch in diameter in these covers.

Q. I believe that is all, unless there is something that occurs to you that you would like to mention?

A. I would like to mention one thing that was brought up in testimony yesterday, where the attorney for the plaintiff indicated to our Assistant General Foreman that these holes were placed in there after the manhole was casted.

Q. Tell the jury about that. What is the facts

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about that?

A. I'd like to say the facts about that is, in the first place the American Standards of Design and Specifications do not permit the use of plugs of any kind to create a hole in a cover, the reason being that they are apt to be knocked out. They could be forced out; they might rust out. You either have to have a positive hole, or you have no hole. At not time ever in the history of Western Union have they had a specification that permitted such plugs. All our specifications have always showed specific drawings showing all dimensions, the number of holes that must be cast in the original covers and the size of these holes all on a drawing which goes to the supplier and is used as a basis of purchase. We would not think of a shoddy method of putting plugs in there so that a man in the field could either put in holes or not put in holes as he saw fit. We would want to know definitely how many holes we had in our covers and what the sizes were and how they were operating.

Q. By the way, there was some comment made yesterday, perhaps this morning, about this particular—Defendant's Exhibit 1—manhole cover as to whether there were plugs in some of these other designs which could be driven out if you wanted to make more holes. Is that a—is it true

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or not that you can make more holes in this, or was it all cast at one time?

A. It's untrue—that you could take any position in there and knock out a hole without cracking the casting.

Q. That is not true?

A. You could not put a hole in there by knocking out a section and creating a hole. You would crack the casting. The only way you can put a hole in there would be to drill it in there.

Q. If you pound it with a hammer, you would actually crack the casting?

A. You couldn't put a hole in that way unless the holes were cast originally and were subsequently plugged up with some other metal, maybe steel or wood. Then you could take a hammer, if you wanted to, and hammer it out without affecting the casting.

Q. Were these particular covers identical to Defendant's Exhibit Number 1 manufactured so you could drive a hole through there?

A. No, never, never. No, no. That irregular surface on there has a specific purpose of creating a rough area so that a person will have less tendency to slip when walking on this cover.

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Q. That's all, Mr. Markley.

Cross-examination by Mr. Robert P. Hobson

MR. HOBSON: Mr. Markley, you don't mean to tell this jury that the caps manufactured and installed for the

Louisville Gas and Electric Company didn't have these holes plugged up so they could be knocked out, do you?

MR. MARKLEY: I certainly do not.

Q. Now,—

A. (Interrupting) I don't know anything about their covers.

Q. Let's get right down to specific cases, if you will, please, sir. You recognize that gas in a manhole oftentimes is heavier than air?

A. You bet.

Q. And the placing of the four holes in the manhole cover represented by Defendant's Exhibit 1 wouldn't get those heavier than air gases out of there, would it?

A. No, they—some would get out by ventilation. Some of the lighter gases would carry off some of the heavier gases.

Q. Well, the heavier than air gases would still be there, wouldn't they, if those holes were—

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A. (Interrupting) Certain amount of them would be, yes.

Q. Yes?

A. Absolutely.

Q. Yes, sir. Now, just one other matter, if I may, please, sir. Will you tell the jury when you first came to Louisville?

A. Well, this is my first visit to Louisville, and I arrived here—

Q. (Interrupting) Just tell us, please, if you will, when you first came to Louisville?

A. When I first came to Louisville was on Tuesday—let's see—Wednesday, of this week. I arrived here at about eleven-fifteen, Louisville time.

Q. That would be the second day of November, 1955?

A. Correct.

Q. Thank you, sir; and that's all.
(Witness excused.)

MR. BLACKWELL: The defendant rests, Your Honor.
BY THE COURT: Any rebuttal?
MR. HOBSON: Nothing, Your Honor.

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BY THE COURT: Ladies and gentlemen of the jury, we will recess for lunch—
MR. HOBSON: (Interrupting) May I speak to Your Honor just a moment before you do that?
BY THE COURT: Yes.
(Off the record discussion between court and counsel.)
BY THE COURT: Ladies and gentlemen of the jury, I give you the usual admonition that you are not to discuss this case among yourselves, permit it to be discussed in your presence or form any opinion until it has finally been submitted to you.
Mr. Crier, recess court until two o'clock, and I'll see counsel in chambers at 1:45.

(Whereupon, at about the hour of 12:10 p. m. court was declared in recess until 2:00 p. m.)
(The following proceedings were had in chambers at the hour of 1:45 p. m.)
MR. BLACKWELL: Let's settle one or two elementary things at the outset.
BY THE COURT: We've got seven minutes before we have to be in the courtroom. I'm just saying that, Lee.

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MR. BLACKWELL: If we have to have more time—
BY THE COURT: We'll have to go in and come back.
MR. BLACKWELL: In the first place, no case can be submitted to a jury where the jury must base its verdict

either way simply upon vague, speculative type of testimony in arriving at its conclusion. If the testimony is vague and uncertain as to the essential issue of the question which the jury is to decide, which in this case is one of negligence, or contributory negligence, then the court must direct a verdict for the one who does not have the burden of proof, or against the one who has the burden of proof.

Now, that is elementary. No jury is permitted to speculate upon its testimony—upon its verdict.

The second elementary thing is—and this is particularly applicable in the Federal Courts, where the facts, the basic facts of liability or nonliability are not disputed, then the court must direct a verdict in accordance with what those basic undisputed facts require, and not submit the case, or any issue, to the jury.

Now, the basic facts in this case are completely established without any contradiction. First, that this lady fell as a result of her left shoe heel catching, she says—and there's no disputed testimony—no testimony disputing it—

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fell when her left shoe heel caught in a hole somewhere on this manhole cover. Second, the manhole itself is in evidence. Its location is in the street; it's not disputed. Therefore, the basic facts are here before the court. Finally, it's not disputed that while there may be exceptions it is the general—there is a general practice of having openings as large or larger than the openings in this manhole cover in such covers in public streets and alleys and other public ways, not only in Louisville, but such has been the case for many, many years, but all over the United States. There is no dispute about that. It may be that here and there they get along without any; that one utility can get along with fewer openings than another.

Now, Your Honor, I was never more serious in my life than when I mentioned yesterday that I think this is a case where the court must direct a verdict for the defendant. I want to say this at the outset. Fair search of the authorities on my part has failed to reveal a single case in the United States in any reported decisions by any court in which a jury has been permitted to determine whether or not holes or openings in manhole covers, or in catch basins, either in public traveled portions of a street or walk have resulted in someone catching their heel in them, and the jury has been permitted to determine

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that that was negligent; not a single case. And in every instance where a jury initially has been permitted to render such a verdict, the court, on appeal, has reversed that jury's verdict, holding that a directed verdict should have been granted for the defendant.

By the Court: Let me interrupt you here. It's almost two o'clock. Now, we've had this jury here for a day and a half. The issues are before them. I frankly think that it is—I mean, it does give me some concern as to whether or not this is a jury issue, but at this time I'm going to submit the case to the jury, and it can always be corrected if there's any necessity for it, and—

Mr. Blackwell: Well, that, of course, involves an appeal.

By the Court: No; it doesn't. On motion for a new trial, if it's adverse to the defendant. But I think that after we've had all this testimony such as we've had here today at great expense to both parties that it's the safer practice to submit it, and if later the court can be convinced that it should not have been submitted it can then be corrected. But I'm going to follow that procedure in this case.

MR. BLACKWELL: In other words, the Court is reserving final—

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BY THE COURT: I'm overruling it at this time. But, as on all motions for a new trial, you will be—

MR. BLACKWELL: Does that include Your Honor's permission that motion for a new trial, to present a motion for judgment for the defendant—

BY THE COURT: Oh, sure.

MR. BLACKWELL: —if the Court should conclude that it should not have submitted the case to the jury?

BY THE COURT: Oh, yes.

Afternoon Session

[Mr. Blackwell and Mr. Hobson argued the case to the Jury.]

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[The Court's Instructions to the Jury.]

BY THE COURT: Ladies and gentlemen of the jury, it is now time for the Court to instruct you on the law of this case. Now, there are both questions of fact and questions of law that are involved here. The law that the Court will instruct you concerning you will apply to the evidence as you have heard it here from the witness stand.

Now, it is not disputed in this case that the plaintiff, Mary Ruth Sparks, was injured on March the 8th, 1954, by catching her heel in one of the holes in the manhole cover—in the manhole cover which was located in the east crosswalk crossing Market Street there at Fourth. The mere fact, however, that the plaintiff suffered injuries as a result of this accident is not in—does not in itself entitle her to recover damages against this defendant. Liability on the part of the defendant does not exist unless there is

fault on the part of the defendant. And in order for the plaintiff to recover for her damages, from the defendant in this case, it

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is encumbent upon the plaintiff to establish by a preponderance of the evidence that the defendant, Western Union Telegraph Company, violated a legal duty it owed to the plaintiff. And the Court instructs you that it was the legal duty of the defendant, Western Union Telegraph Company, to exercise ordinary care to see that the cover on the manhole in question was constructed, designed and maintained in a reasonably safe condition for the use of pedestrians using and walking on the crosswalk, including the plaintiff here, Mary Ruth Sparks. And if you believe from a preponderance of the evidence in this case that the defendant failed to perform this duty, and that by reason thereof the plaintiff was caused to fall and be injured, then the law of this case is for the plaintiff, Mary Ruth Sparks, and against the defendant, Western Union Telegraph Company, and the jury will so find, unless the jury further believes from the evidence that Mrs. Sparks herself failed to exercise ordinary care for own safety at the time that she walked on the manhole cover in question and that but for such failure on her part this accident would not have occurred. And if the jury shall believe from the evidence that Mrs. Sparks failed to exercise such ordinary care for her own safety and such failure on her part contributed to the accident, the jury will find for the defendant,

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even though the jury may believe from the evidence that the defendant itself failed in the performance of its duty as set forth in these instructions.

Now, as used in these instructions negligence means the failure to exercise ordinary care. And ordinary care means that care exercised by ordinary prudent persons

under the same or similar circumstances as described in the evidence in this case. By preponderance of the evidence I mean the superior weight of the evidence upon the issues involved. It does not mean that it should be enough to wholly free the mind from a reasonable doubt, and you jurors of course have heard the definition of reasonable doubt throughout the criminal trials in which you have sat on the jury. But it does mean that it should be sufficient to incline a reasonable and impartial mind to one side of an issue rather than to the other. It does not necessarily mean the greater number of witnesses, as it is the weight of credible evidence which you are considering rather than the number of witnesses. If in your opinion there should be an even balancing of the credible evidence, this rule which requires the preponderance of the evidence of course has not been satisfied.

Now, in considering this case you should first consider whether or not the defendant was negligent, and, if so, then

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whether or not such negligence, if any there was, on his part was the proximate cause of the accident and the injuries sustained by the plaintiff. And if on this issue you find for the defendant, namely, either that the defendant was not negligent, or if such negligence, if it did exist, was not the proximate cause of the accident and the injuries complained of, then your verdict will be for the defendant and your deliberations would be concluded. If, however, you should find on that issue in favor of the plaintiff, then it will be necessary for you to further consider whether or not the plaintiff herself was guilty of contributory negligence as I have heretofore defined it to you. And if you further find that the plaintiff was not guilty of contributory negligence, then your verdict will be for the plaintiff.

Now, if your verdict is for the defendant, you will say

so by your verdict, and no more. However, if your verdict is for the plaintiff, then it is necessary for you to further consider the amount of damages to which the plaintiff is entitled on account of the injuries sustained by her, and the matter of assessment of damages is wholly within your judgment, subject to certain limitations which I shall state to you as elements to be considered in arriving at a verdict should you reach that point in your deliberations.

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If you find for the plaintiff, you will award her such a sum in damages as will fairly and reasonably compensate her for any mental and physical suffering which she has endured, or it is reasonably certain she will hereafter endure, so far as the same are shown by the evidence as the direct result of this accident in question. And you should take into consideration such loss of health and disability as you may believe from the evidence she has sustained by reason of such injury. And if you further find from the evidence that her injuries are permanent in whole or in part and that she will suffer any disability therefrom in the future with reasonable certainty, she's entitled to recover for such future disability and any future effect it may have upon her mental and bodily strength and health and any effect it may have upon her future ability to work and labor. On the total amount that may be awarded to the plaintiff for pain and suffering, if any, and for her permanent loss of power to earn money, if any, it shall not exceed the sum of $15,000, which is the amount claimed in the petition. And you may also award her such a sum in damages as you may believe from the evidence will reasonably and fairly compensate her for h doctors, hospital and medical bills that were incurred as a direct result of this accident, not to exceed on this account the sum of $2324, which is the

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amount claimed in the petition. And you may further award the plaintiff such reasonable sum as you may believe from the evidence will fairly and reasonably compensate her for her loss of time from her employment; that is, her loss of wages that may, or did, directly result from this accident, not to exceed on that account the sum of $1343. Your total award in no event shall exceed the sum of $18,667. And also in considering, ladies and gentlemen of the jury, any permanent loss of power to earn money, you should consider such permanent loss of power to earn money beginning after the time for any compensation that you may determine she may reasonably be entitled to from the loss of wages.

Now, ladies and gentlemen of the jury, the parties stand in this court before you on an entire equality, and your verdict, if any, should be fair and just of course to both sides. You should not be moved by any sympathy that one would naturally feel for one who has been injured and who has suffered. But your verdict and the amount thereof, if it should be for the plaintiff, should be controlled by the evidence and the limitations of the law which the court has given to you in these instructions.

I have prepared a verdict, "We, the jury, find for the plaintiff, Mary Ruth Sparks, in the sum of ....."

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And another verdict, "We, the jury, find for the defendant, Western Union Telegraph Company," with a blank space to be signed by your foreman. In deciding upon your verdict, you will scratch through the one that is not used?

Gentlemen, are there any motions?

MR. HOBSON: Just as a matter of precaution, I'm sure Your Honor intended to tell the jury that the verdict should be unanimous.

MR. BLACKWELL: Your Honor, the defendant wishes to make one or two exceptions to the instructions.

BY THE COURT: Do you want to make them at this time? Do you want to approach the bench, please?

MR. BLACKWELL: The defendant objects to that portion of the Court's instructions with reference to making any award by the jury of any damages for the future for supposed permanent loss of power to earn money. The defendant requests that the Court give to the Jury Instruction Numbered 1 of the written instructions which the defendant has previously handed to the Court. And also—that is to the effect that the Western Union was required by ordinance to have and maintain its facilities underground—

BY THE COURT: (Interrupting) Mr. Blackwell, all of the objections are reserved on everything that's

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offered in chambers, and any variance from your instructions, that is saved to you as an objection anyway.

MR. BLACKWELL: Well, the defendant does request that the Court give the jury all of the instructions which have been given to Your Honor in chambers, and objects to the Court's failure to give those instructions, the written instructions, as stated in the instructions.

BY THE COURT: All right. Ladies and Gentlemen of the jury, your verdict must be unanimous, and you will go now in custody of the marshal to consider your verdict.

(Thereupon, the jury retired to the juryroom for its deliberations at approximately 3:09 p. m.)

(At approximately 3:40 p. m. the jury returns to the courtroom at its own request.)

BY THE COURT: Gentlemen, I was informed— I was informed by the marshal that the jury desired further instructions from the Court and that is the reason the court was convened. I now understand from the marshal

that they do not wish to make any further inquiry of the court.

Mr. Crier, recess court until the return of the jury.

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(Thereupon, at about the hour of 3:42 p. m, the jury retired to the juryroom to continue its deliberations, and returned at about the hour of 4:10 p. m. with its verdict.)

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CERTIFICATE

I, MARION D. ODLE, Official Court Reporter, United States District Court, Western District of Kentucky, at Louisville, Kentucky, hereby certify that the foregoing is a true and accurate transcript of the proceedings held in the captioned cause in said court; that said proceedings were taken down by me in stenographic notes and thereafter reduced by me to the foregoing 324 typewritten pages.

I further certify that I am not related by blood or marriage to any of the parties hereto and that I have no interest in the outcome of captioned cause.

Dated at Louisville, Kentucky, this the 6th day of August, 1956.

MARION D. ODLE
Official Court Reporter

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTTED

April 16, 1957—Before Simons, Chief Judge, Allen and McAllister, Circuit Judges.

This cause is argued by R. Lee Blackwell for appellant and by John P. Sandidge for appellee and is submitted to the court.

JUDGMENT

[Filed April 23, 1957]

The above cause coming on to be heard upon the record, the briefs of the parties, and the arguments of counsel in open court; and it appearing that the jury's award of damages was not excessive; that the instructions given by the district court to the jury properly placed before it the issues in the case, when considered as a whole; and the court being duly advised,

Now therefore, it is ORDERED, ADJUDGED and DECREED that the judgment of the district court be affirmed, on the opinion of Judge Brooks overruling appellant's motion to set aside the verdict of the jury and to enter judgment in accordance with appellant's motion for a directed verdict, as reported in 141 F. Supp. 328, which is hereby adopted as the opinion of this court.

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING

[Filed May 13, 1957]

It is hereby ORDERED that the time within which appellant, Western Union Telegraph Company, may file its petition for rehearing be and is hereby extended to and including May 27, 1957.

No. 13,019

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

October Term, 1959

THE WESTERN UNION TELEGRAPH COMPANY, Appellant,

versus

MARY RUTH SPARKS, Appellee.

Appeal from the United States District Court for the Western District of Kentucky

WESTERN UNION TELEGRAPH CO.'S PETITION FOR REHEARING

This Court of Appeals, without writing any Opinion of its own, affirmed the Judgment, on the opinion of District Judge Brooks. This appellate court thus decided an important Kentucky question in a way which is plainly in conflict with the applicable Kentucky law.

This Petition is for a rehearing, preferably by this court *en banc*.

WM. MARSHALL BULLITT,

BULLITT, DAWSON & TARRANT,

JOHN H. WATERS,

Of Counsel for Appellant.

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Western Union obeyed that Ordinance. Many years ago it installed in the street an authorized manhole, so that it could service its underground wires; and put on the manhole an authorized cast iron Cover with "quarter-sized" vent holes through the Cover, to remove explosive gases which tend to accumulate in manholes 2

2. In broad daylight, Mrs. Sparks—who had previously walked across the street where that manhole (and Cover thereon) was located, "at least a hundred times or more" in a recent period—put her 3 or 4-inch high shoe heel, with a "nickel-sized" heel tap, into one of the vent holes in the Cover; fell forward, and injured herself 3

3. No one, ever before, has ever caught his or her shoe heel (*a*) in one of those quarter-sized vent holes in any of Western Union's 14,000 identical manhole covers, which for many years have been on its 14,000 manholes in the streets in busy sections of all the large cities all over the United States, or (*b*) in any of the hundreds of thousands of other utilities' manhole covers, with equally large holes through the covers; that other utilities have maintained for many years in busy streets all over the United States 3–4

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This is the *first* (and *only*) case in which any Federal court, or any State court, anywhere in the United States, at any time, has ever held that it was negligent to have in any street or crosswalk anywhere in the United States, a manhole cover with vent holes through the cover, in which any pedestrian has ever been injured by catching his or her shoe heel in one of the vent holes..... 4–5

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

October Term, 1956.

No. 13,019.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant,*

v.

MARY RUTH SPARKS, - - - - - *Appellee.*

Appeal from the United States District Court
For the Western District of Kentucky.

THE WESTERN UNION TELEGRAPH COMPANY'S PETITION FOR REHEARING

Western Union Telegraph Company (1) Petitions for a *rehearing* on the Order of April 23, 1957 (12 lines in length), which affirmed the $18,000 Judgment in favor of Mrs. Sparks; and (2) Requests that the rehearing be before the Court *en banc* [under Rule 3(1)].

This Court did not deliver any opinion of its own; but this Court's Order affirmed the Judgment simply "on the opinion of Judge Brooks" (*Sparks* v. *Western Union,* 141 F. Sup. 328) which it "adopted".

/

The Facts.[1]

Judge Brooks' Opinion (which this Court adopted) **omitted** many material facts.[2] For this Court's convenience a summary of the facts follows:

1. A 1906 Louisville Ordinance (*a*) Prohibited Western Union (and all the other utilities) from having any wires *above* the surfaces of the streets and required that (before Dec. 31, 1910) they place them *under* the streets' surface; and (*b*) Authorized construction in the streets of manholes, with covers on them, into the underground wires.[3] Western Union (and the other utilities) *obeyed* that Ordinance.

Nearly fifty years ago (in 1909), Western Union built an authorized manhole in Market Street at its intersection with Fourth Street, near Western Union's main Louisville office, and in 1927 it installed on that manhole a 250-pound circular cast-iron Cover. As highly explosive and deadly poisonous gases tend to accumulate in manholes, Western Union's authorized manhole Cover had four "quarter-sized" Safety vent holes through it, to prevent disastrous explosions.

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[1]Western Union's Brief states (*a*) all of the Undisputed Facts, at pages 1-10, and (*b*) all the Relevant Evidence about those facts, at pages 14-32 and 53-55)—with full references in support thereof to the pages of its separately bound Appendix.

[2]Judge Brooks delivered his Opinion **seven months** after the Trial, and *without* the aid to his memory of having before him any transcript of the 180 printed pages of the evidence (R. 9a-10a, 14a, 23a, 216a).

[3]That 1906 Ordinance required the approval, in advance, by the City's Board of Public Works, of the *location* in the street, and of the "detailed *specifications* and plans" for, manholes and their covers (R. 89a).

2. On March 8, 1954, in broad daylight, Mrs. Sparks (46 years of age), while on her way to work at Bacon's store, wearing ladies' shoes which had very slender 3 or 4-inch high heels, with "nickel-sized" heel taps, stepped on that manhole Cover.

For more than two or three months, only a short time before, Mrs. Sparks had walked across this very *same* crosswalk in which this *same* manhole Cover was located, "twice a day", "every day" or "at least a *hundred* times or more", in going to work at this same Bacon's store.

Mrs. Sparks absolutely knew that "all" manhole covers "have *holes* in them". She could plainly see (*a*) this manhole Cover itself "half way across the street" and (*b*) its vent holes themselves, "more than four good steps" before she got to it—if she had looked where she was going. She did *not* look, or pay any attention whatever to the Cover, when she stepped on the Cover. She stuck her left nickel-sized shoe-heel tap in one of the Cover's quarter-sized vent holes; and fell forward and fractured her knee.

3. For many years, Western Union has had 14,000 manholes (151 in Louisville alone) in the streets in busy sections of all the large cities all over the United States, with 14,000 covers on them which have identically the *same* four quarter-sized Safety vent holes through the covers which are in the Cover upon which Mrs. Sparks fell. **Out of the millions of people who have walked over those streets in which Western Union's 14,000 manholes (and their covers) are lo-**

cated, Mrs. Sparks is the very *first* (and only) pedestrian who has *ever* been injured, anywhere in the United States, on any of those 14,000 identic manhole covers.

But that is not all.

The other large public utilities (such as the Bell Telephone System), and cities and their agencies, for many years have maintained in busy streets in cities (including Louisville) all over the United States hundreds of thousands of manholes which have covers on them that have from a few, to a great many, equally large open holes all the way through the covers. **As far as the reported Federal and State court cases show, out of the countless millions of people who have walked over the streets in which those other utilities' manholes are located, no pedestrian, at any time, anywhere in the United States, has *ever* been injured by catching his or her shoe heel in any of the holes in any of those other utilities' hundreds of thousands of manhole covers.**

But that is not all.

Mrs. Sparks' only allegation that Western Union was in any way negligent is that "said manhole cover contained *holes*". **As far as the reported cases show, this is the *first* (and only) case in which any Federal court, or any State court, anywhere in the United States, at any time, has ever held that it was negligent to have in any street or crosswalk anywhere in the United States, a manhole cover with vent holes through the cover, in which any pedestrian has ever**

been injured by catching his or her shoe heel in one of the holes, or by which he or she was otherwise injured as a result of those holes in the cover.[4]

Those plain facts emphasize the far-reaching effect of this Court's unprecedented Order of April 23, not only on Western Union's nation-wide system, but also upon the other public utilities and cities all over the country. Judge Brooks' Opinion, and this Court's affirming Order, jeopardize the continued use in the future of manhole covers (in which there are vast financial investments) that have in them Safety vent holes which utilities and cities have always almost universally used to prevent explosions.

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[4] *Bianchetti* v. *Luce*, 222 Mo. App. 282 (1928), is *not* an exception. The plaintiff, a crippled woman who walked with a crutch, fell and hurt herself when she inserted her crutch in a 2-inch hole in the sidewalk, where one of several prism glasses in an appliance in the sidewalk had been broken out two months before. Although the Court referred to the sidewalk appliance as a "manhole covering", it was *not* a manhole cover but was a sidewalk appliance which was designed to furnish light to an abutting building's basement which extended out underneath the sidewalk.

Moreover, the same *intermediate* appellate court which allowed recovery in that *Bianchetti* case, twelve years later, in *Watts* v. *R. A. Long Bldg. Corp.*, 142 S. W. 2d (Mo.) 98 (1940), held that the *Bianchetti* case "must be considered as having been **overruled**" by the decision of the Supreme Court of Missouri in *Callaway* v. *Newman Medical Co.*, 221 Mo. 766.

ARGUMENT

The Grounds for this Petition are:

I. *Erie Railroad* v. *Tompkins*[3] (which District Judge Brooks and this Court either overlooked or failed to follow) requires that in this suit for *negligence* the Federal Courts *must* apply the Kentucky law of negligence.

The *Erie Railroad* case[3] was a suit for negligence that involved a Pennsylvania accident. The Supreme Court directly held that the Federal courts had to apply the Pennsylvania law of negligence (even where the suit was in a Federal court in New York).

Mrs. Sparks' injury, and what she claims caused it, happened in Kentucky; and her counsel *conceded*, at the oral argument of this case in this Court, that the Kentucky law of negligence *must* control this case's decision.

II. The settled Kentucky law is that the use of a *physical* "thing" or "instrument" in the way and for the purpose of which it was designed, and which is "in common use" in that way and for that purpose, "is *not* a negligent act upon the part of the possessor" of that "thing" or "instrument".

1. *Manhole covers, with vent holes through them, are "in common use".* Western Union's Brief sets out (pp. 6-8, 25-32) the evidence which, without the slightest contradiction, showed that for many years manhole covers, with "quarter-sized" open vent holes through the covers, have been "in common use"—and in almost

[3] 304 U. S. 64.

universal use—in Louisville and in other cities all over the United States.

Western Union's Brief sets out (pp. 6-7, 19-25) the evidence which, likewise without the slightest contradiction, showed that the number and size of the vent holes in *this* Western Union manhole Cover not only conform to the National Standard which the American Standards Association has established for manhole covers for use all over the United States, but they also conform to the manhole covers which for many years *actually* have been in *common use* all over this country.

Western Union's Brief sets out (pp. 4-6, 14-19) the evidence which, without the slightest contradiction, showed that **unless** manhole covers have these vent holes through them, the manhole "becomes a *safety hazard* on the streets of the city of Louisville" (R. 123a-124a), because of the danger of manhole explosions that would "blow the cover *sky high*" or "flip a manhole lid over *on top of a building*" (R. 110a-111a, 200a-201a).

Judge Brooks' Opinion states that "there is no doubt that manhole covers" are "things in common use" (R. 15a); but, in his 5-page Opinion he **failed** to discuss, or even to mention, the uncontradicted evidence that manhole covers, for compelling *safety* reasons, *must* have vent holes.

2. *The scope and application of the applicable Kentucky law "common use rule."* Western Union's Brief sets out (pp. 33-46) the five most recent Ken-

tucky decisions[6] which have stated, and applied, Kentucky's "common use rule" in respect of a *physical* "thing" or "instrument"—and also sets out many modern decisions of courts elsewhere (Brief p. 40-44) which apply the same "common use rule" and hold that without the rule "there would be no safety except to *abandon* the use of *machinery*" (*Id.* p. 43).

In the *Ellis* case [251 S. W. 2d 577] the Kentucky Court stated that its "common use rule" is:

> "Persons who are charged with a duty in relation to a particular matter or thing have a right to **rely** upon the sufficiency of a *structure* or *contrivance* which is in *common use* for the purpose and has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose."

In the *Greater Louisville, etc. Assn.* case [242 S. W. 2d 739], the Kentucky Court said that the exposed hot radiator pipe which was there involved was like "un-

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[6] *Greater Louisville First Federal Savings & Loan Assn.* v. *Stone*, 242 S. W. 2d (Ky.) 739; Child burned on exposed hot radiator pipe; Rule stated and applied; Recovery *denied* upon ground defendant *not* negligent; Brief p. 34-35.

Haar v. *Vogelman Bakery Co.*, 312 Ky. 307; Child injured while using gasoline filling station can with spout on it; Rule stated and applied; Recovery *denied* upon ground defendant *not* negligent; Brief p. 35.

McNeal v. *City of Louisville*, 287 Ky. 83; Lady's high heel shoe caught in hole in cover over a catch basin in crosswalk; Recovery *denied*; Defendant *not* negligent; Brief p. 36-37.

City of Louisville v. *Moore*, 267 Ky. 536; Shoe heel caught in hole in cover over a catch basin; *No* negligence; Recovery *denied*; Brief p. 37-38.

Ellis v. *L. & N. R. Co.*, 251 S. W. 2d (Ky.) 577; Railroad sanding job appliance; Rule fully stated and applied; Recovery *denied* upon ground defendant *not* negligent; Brief p. 39.

guarded hot coal stoves" which are still in *common* use; and said:

> "Therefore, having and keeping radiator pipes unguarded in a building, is **not** a negligent act upon the part of the *possessor* of property."

In the *McNeal* case [287 Ky. 83], the Kentucky Court held that even though Mrs. McNeal caught her slender shoe heel in a hole in the cover over a catch basin in a crosswalk she could not recover, saying that

> "the mere fact that plaintiff's shoe heel caught in the catch basin is *no* evidence of negligent construction or negligent maintenance of the catch basin in question and that the court did **not** err in *peremptorily* instructing the jury to find a verdict for defendant."

Judge Brooks' Opinion does not cite, and Mrs. Sparks' counsel has never cited, a single Kentucky case to distinguish any of those five recent applicable Kentucky "common use rule" decisions (p. 8, *supra*). The best which either could do, to try to escape the Kentucky law, was to cite (R. 18a; Mrs. Sparks' brief, p. 38) the *Empire Oil* case [112 F. 2d 356], which her counsel said is "the rule of this court". *But* the *Empire Oil* case did **not** involve *Kentucky* law; and did **not** involve a *physical* "thing" or "instrument" or other "appliance". It involved the *Michigan* law, as to a Michigan lease of Michigan oil lands, and an oil well "acidizing" *process or procedure* under that lease. That case had nothing whatever to do with *Kentucky* law, or with a *physical* "thing" or "instrument" or

"structure" or "contrivance" to which the Kentucky Court has uniformly applied its "common use rule"—irrespective of what may be the Kentucky or the Michigan [or this Court's view of the Michigan] law about *processes or procedures.*

Is this Court satisfied to depart from the Kentucky law, which those five Kentucky cases establish, and to base its departure (as the District Court did) solely upon what may be the Michigan law on a wholly different matter? It can hardly be believed that, upon reflection, this Court will be satisfied to do that—especially in an unprecedented decision which has such far-reaching consequences.

III. Both of the *two* reasons which Judge Brooks' Opinion gave for his refusal (*a*) to apply Kentucky's "common use rule" and (*b*) thus refusal to Direct a verdict for Western Union upon the ground that it was *not* negligent, are completely insufficient.

1. Judge Brooks' Opinion's *first* ground (R. 15a) is that Kentucky's "common use rule" does not apply unless the "public" knows that the "thing" or "instrument" is dangerous (R. 15a). No Kentucky case places any such limitation upon that rule; but, even if that limitation exists, it cannot apply in this case, because "*public*" knowledge is not involved. Mrs. Sparks had *actual personal* knowledge of the supposed danger. She knew that her shoes had "nickel-sized" heel taps, and she had *absolute* knowledge that **"all"** manhole covers have *holes* in them, as she showed when she exclaimed from the witness stand:

"Well, don't *all* of them have *holes* in them?" R. 50a).

Moreover, as the Kentucky Court said in the *Interstate Coal Co.* case [148 Ky. 160; Brief, p. 57-58], a person

> "*must* know those things which are *right before his eyes*, and which he himself admits having *seen*".

Under the law, she therefore **knew** of the supposed danger, if she put her slender shoe heel into one of the vent holes.

2. Judge Brooks' Opinion, as the *second* ground for refusal to apply the "common use rule", falls into *two* serious errors (*a*) and (*b*) as follows:

(*a*) That Opinion erroneously states (R. 15a, 16a) that under the *Greater Louisville, etc. Assn.* case [242 S. W. 2d 739; Brief, p. 34-35]—in which the Kentucky Court **did** apply the "common use rule"—it must be shown, before the rule can apply, that the person who uses the "thing" or "instrument" could not "anticipate that any injury would ever occur" from its use.

But, Judge Brooks overlooked the fact that evidence that the "thing" or "instrument" **is** in "common use" does, **itself,** show that the user of that "thing" or "instrument" should *not* be held to "anticipate" injury from its use. In this case, the evidence is absolutely uncontradicted that manhole covers with these vent holes in them **are** in "common use". That proof of "common use" is precisely what the Kentucky Court said in the *Greater Louisville, etc. Assn.* case, *supra*,

exonerates the user from liability, when the Court said that where the "thing" or "instrument" is in *common* use,

> "*no* property owner *should* be held to anticipate that any injury would ever occur by reason of the existence of such a *commonplace* condition" [242 S. W. 2d (Ky.) at 741].

(*b*) That Opinion erroneously holds that the evidence about Louisville Gas & Electric's haphazard expedient of stopping up (with removable rivets) the holes in some of its manhole covers[7] keeps the "common use rule" from applying.

Apparently, Judge Brooks' view was that for a "thing" to be in "common use" it must be used *universally*, by *everybody*, without exception; and that even though vast numbers of persons uniformly use the "thing", a single isolated instance that another uses something else keeps the "thing" from being in *common* use. That cannot be.

A thing is in "common" use when it is in "frequent", or "general" use. Carpets on floors are in common use—but many floors do not have carpets on them. Coal burning locomotives are in common use—but many have Diesel engines. Coal burning heating furnaces are in common use—but many furnaces burn oil or gas. Heating stoves (to use the Kentucky Court's illustration) are in common use—but many houses are otherwise heated.

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[7]See Western Union's Brief p. 22-23, 48-51; Reply Brief p. 5-9.

The District Court's error is patent—even aside from the uncontradicted evidence of Louisville Gas & Electric's own Engineer (who was Mrs. Sparks' own witness), to the effect that when the number of *open* vent holes are reduced

> "you are simply taking a *greater* risk of *explosions*" (R. 71a-72a).

IV. The District Court should have Directed a verdict for Western Union upon the *further* ground that, under the Kentucky law, the uncontradicted evidence showed that Mrs. Sparks' injury was caused by her *own* negligence as a matter of law.

Judge Brooks' Opinion (which this Court adopted) does **not** discuss, or even mention, the uncontradicted evidence of Mrs. Sparks' *own* negligence as a matter of law.

Western Union's Brief (*a*) States all the evidence at pp. 9, 53-54, and (*b*) Sets out at pp. 55-58 the Kentucky decisions, which make it perfectly clear that Mrs. Sparks' injury resulted from her *own* negligence as a matter of law. Mrs. Sparks knew the size of her shoe heel taps. She admitted that she "*knew*" that "*all*" manhole covers "have *holes* in them"; that she had walked over precisely this same crosswalk "twice a day" "every day", "at least a hundred times or more"; and that the holes in this manhole Cover were visible to her "more than four good steps" away—and that **she did not look.**

The Kentucky law[8] is clear as to the duty to look out for one's own safety; and, as said by this Court in *Standard Oil Co. of Ky.* v. *Noakes*, 59 F. 2d 897, in holding that the District Court should have directed a verdict against a plaintiff who failed in her "duty to look",

> "the failure to do so is *negligence* which will *defeat* recovery if accident results" [Simons, J.].

CONCLUSION.

A rehearing should be granted, because this Court (without delivery of any opinion of its own) by its Order of April 23, decided an important Kentucky question in a way which is in *conflict* with the applicable Kentucky law. (Compare Rule 19 of the Rules of the United States Supreme Court.)

The decision is unprecedented—never, as far as reported cases show, has any court *ever* before allowed recovery to *anybody* for an injury from catching a heel in a vent hole in a manhole cover—and never before has anyone received such an injury.

The decision's implications go far beyond the $18,000 amount of this Judgment; it jeopardizes future use of vent holes, which for *fifty years* have been in *common use* everywhere to prevent disastrous manhole explosions.

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[8] *Crain* v. *City of Louisville*, 259 S. W. 2d (Ky.) 52; *Curtis* v. *Traders Nat. Bank*, 237 S. W. 2d (Ky.) 76; *Interstate Coal Co.* v. *Deaton*, 148 Ky. 160.

The question is so important that it merits a rehearing before the Court *en banc* [under Rule 3(1)].

WM. MARSHALL BULLITT,
Counsel for Appellant.

BULLITT, DAWSON & TARRANT,
JOHN H. WATERS,
Of the New York Bar,
General Attorney of Appellant,
Of Counsel.

Certificate of Counsel.

I certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

WM. MARSHALL BULLITT,
Counsel for Appellant.

Louisville, Ky.,
May 20, 1957.

ORDER DENYING REHEARING

[Filed May 30, 1957]

The petition for rehearing is denied.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

I, Carl W. Reuss, Clerk of the United States Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of appendix and proceedings in the case of THE WESTERN UNION TELEGRAPH COMPANY

vs.

MARY RUTH SPARKS

No. 13,019, as the same remains upon the files and records of said United States Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 10th day of June, A. D. 1957.

[SEAL]

CARL W. REUSS,
Clerk of the United States Court of Appeals for the Sixth Circuit.

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SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 259

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - Petitioner,

versus

MARY RUTH SPARKS, - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

United States Court of Appeals for the Sixth Circuit.

WM. MARSHALL BULLITT,
Counsel for Petitioner.
Address: 1700 Ky. Home Life Bldg.,
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JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

References and Statement under Rule 23-1(*a*) and (*b*).

Opinions Below: All are contained in the Record [see Rule 21-1 (*i*)]; *Sparks* v. *Western Union*,* 141 F. Sup. 328 [District Court, Brooks, J.; R. 14a-18a]; and *Western Union* v. *Sparks*, in the U. S. Court of Appeals (6th Cir.); not yet reported; No separate Opinion; Judgment only [R. 219a].

Grounds For Supreme Court's Jurisdiction: (*a*) **Date, and time of entry, of Judgment:** District Court, June 11, 1956 (R. 19a); C. A. 6th Cir. April 23, 1957 (R. 119a), and rehearing denied May 30, 1957 (R. 222a); (*b*) **Statutory Jurisdictional Authority:** 28 U. S. C. §1254(1) [62 Stat. p. 928, §1254(1); see Rule 19-1(b)]. This is a civil case, after rendition of judgment by the United States Court of Appeals (6th Cir.).

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*The petitioner, The Western Union Telegraph Company, is herein called "Western Union"; and the respondent, Mary Ruth Sparks, is herein called "Mrs. Sparks."

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Supreme Court of the United States

October Term, 1956

No. _____.

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner,*

v.

MARY RUTH SPARKS, - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

The Western Union Telegraph Company [herein called Western Union] petitions for *Certiorari*[1] to review *Sparks* v. *Western Union*, 141 F. Sup. 328 (R. 14a-18a); *Western Union* v. *Sparks*, —— F. 2d —— [C. A. 6th; R. 219a], in which the United States Court of Appeals for the Sixth Circuit decided an important Kentucky question in a way which is in direct conflict with the applicable plainly established Kentucky law [Rule 19-1 (*b*)].[2]

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[1]See inside cover page for References and Statement under Rule 23-1 (*a*) and (*b*).

[2]There is appended at p. 15, *infra* [as required by Rule 23-1-(j), Revised Rules of Supreme Court, p. 23], a copy of (**a**) the District Court's judgment and (**b**) the judgment of the Court of Appeals (6th) which, ***without opinion***, affirmed the District Court's judgment, review of which is sought.

Statement of the Case.

1. A 1906 Ordinance of Louisville, Ky.,[3] (*a*) Required Western Union (and other utilities) to remove its electric wires and cables from "*above* the surface" of the streets and to "place and maintain" them *under* the streets' surface; and (*b*) Authorized manholes in the streets, with covers on them, into the underground wires and cables (R. 87a-89a).

In 1927 Western Union installed on its authorized manhole (which it had built in 1909) in Louisville's Market Street, the authorized 250-pound circular cast-iron manhole Cover which this case involves (R. 198a-200a).

As highly explosive gases tend to accumulate in manholes, Western Union's manhole Cover had four "quarter-sized" Safety vent holes through it (R. 70a-72a, 109a-111a, 137a, 176a, 195a). Without those vent holes, a manhole "becomes a safety *hazard* on the streets of the city of Louisville" (R. 124a), and the "very highly explosive gases" "would blow the cover sky high in the air" (R. 200a-201a).

2. On March 8, 1954, Mary Ruth Sparks [herein called Mrs. Sparks], a part-time saleslady who was 45 years of age and on her way to work (R. 26a, 46a), wore ladies' shoes which had very slender 3 or 4-inch high heels, with "nickel-sized" heel taps (R. 29a; Plff's Ex. 1).

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[3]The Ordinance [7th Biennial Comp., Gen. Ord. of City of Louisville, 1907, pp. 832 *et seq.*] is Stipulated at R. 85a-99a.

Mrs. Sparks *knew* that **"all"** manhole covers "have holes in them" (R. 50a). Recently, she had walked across this same street where this same manhole Cover was located, "twice a day," "every day"—"at least a hundred times or more" (R. 26a-27a, 46a). It was broad daylight (R. 46a). She could see the vent holes in this Cover "more than four good steps," before she got to it (R. 47a-48a); but **she did not look,** or pay any attention to the Cover. She stepped on the Cover, stuck her "nickel-sized" heel tap in one of the Cover's "quarter-sized" Safety vent holes, fell forward and fractured her knee (R. 27a-30a).

3. For many years, Western Union has had 14,000 manholes (151 in Louisville alone) in busy streets in all large cities all over the United States, with 14,000 covers on them which have *identically* the same four "quarter-sized" Safety vent holes in the covers which are in the Cover upon which Mrs. Sparks fell (R. 197a-199a). Out of the millions of people who have walked over Western Union's 14,000 manholes (and their covers), Mrs. Sparks is the very *first* (and only) pedestrian who, so far as our careful research has disclosed, has ever sued Western Union (and, perhaps the only one who has ever been injured) anywhere in the United States, on account of any of those 14,000 identic manhole covers (R. 203a).

Other large public utilities (such as the Bell Telephone System), and cities and their agencies, for many years have maintained in busy streets in cities (including Louisville) all over the United States hun-

dreds of thousands of manholes which have covers on them that have from a few, to a great many, equally large "quarter-sized" open holes all the way through the covers (R. 67a, 69a, 70a, 81a, 111a-113a, 145a, 147a-150a, 172a, 175a, 183a, 184a, 197a, 199a). As far as reported Federal and State court cases show, out of the countless millions of people who have walked over the streets in which those *other* utilities' manholes are located, no pedestrian, at any time, anywhere in the United States, has ever been injured by catching his or her shoe heel in any of the holes in any of those *other* utilities' hundreds of thousands of manhole covers.

As far as the reported cases show, no Federal court, and no State court, anywhere in the United States, at any time, has ever before held that it was negligent to have in any street or walkway anywhere in the United States, a manhole cover with vent holes through the cover, in which any pedestrian has ever been injured by catching his or her shoe heel in one of those holes.

4. In Mrs. Sparks' suit for damages[4] the District Court (1) Denied Western Union's Motion that it *direct* a verdict in Western Union's favor upon the grounds that the evidence (*a*) failed to show any negligence on Western Union's part and (*b*) showed Mrs.

[4]The District Court's jurisdiction was based upon Western Union's removal of the suit from the Kentucky state court to Federal court (pursuant to Title 28, U.S.C., §§ 1441 *et seq.*), upon the ground of diversity of citizenship, Mrs. Sparks being a Kentucky citizen and Western Union a New York corporation and citizen (R. 1a).

Sparks' contributory negligence as a matter of law (R. 10a-11a); (2) Overruled Western Union's Motions to enter Judgment in its favor, or for a new trial (R. 10a-13a; Memorandum Opinion, 141 F. Sup. 328, R. 14a-18a); and (3) Entered Judgment on the Jury's $18,000 Verdict for Mrs. Sparks (R. 19a).

The Court of Appeals (6th Cir.), **without** writing any Opinion of its own, affirmed the District Court's Judgment and denied Western Union's Petition for rehearing (R. 222a).

The Questions Presented.

I. Under the Kentucky law that it is **not** negligent for one to use or maintains a *physical* "thing" or "instrument" that is in "*common* use":

Can Western Union be liable, upon grounds of negligence, for Mrs. Sparks' injuries from falling when she caught her high shoe heel, with a "nickel-sized" heel tap, in one of the four "quarter-sized" Safety vent holes in Western Union's cast-iron manhole Cover (in a Louisville, Ky. street) where, for many years, manhole covers with those "quarter-sized" vent holes through them have been in "*common use*" in Louisville and all over the United States?

II. Under the Kentucky law that a woman who, with knowledge of an alleged defective condition in a walkway, fails to look where she is going, and falls and hurts herself, is **herself,** guilty of *contributory* negligence as a matter of law (which, under Kentucky law, bars recovery):

Was Mrs. Sparks guilty of *contributory* negligence as a matter of law when, with absolute knowledge that all manhole covers have holes through the covers, she, *without looking where she was going*, in broad daylight, stepped on Western Union's perfectly visible manhole Cover in a Louisville, Ky. street with her "nickel-sized" heel taps, caught one of them in a "quarter-sized" vent hole in the Cover, and fell and hurt herself?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First.

The C.A. (6th) decided the case in a way which, in *two* respects, is directly contrary to the applicable and plainly established Kentucky law.

Under *Erie Railroad* v. *Tompkins*[5] the Kentucky law of negligence must be applied, as Mrs. Sparks' injury and the events leading up to it occurred in Kentucky.

I. Under Kentucky law, Western Union could not be found negligent.

1. This type of manhole Cover, upon which Mrs. Sparks fell, with its four "quarter-sized" Safety vent holes through the Cover, has been in "*common use*" for many years in Louisville and other cities all over the United States.

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[5]304 U. S. 64.

The plain fact is that vented manhole covers do not present any measurable risk of injury to pedestrians. If this were not so, there would be more manhole cases of the sort here concerned. It is probable that the footgear worn by Mrs. Sparks was unsuitable for use by pedestrians in city streets. It appears that the risk of injury to Mrs. Sparks, in this case, was self-created, and she did not guard against it, or even attempt to do so, as other ladies who choose to wear such footgear when walking in the city streets no doubt do. Under Kentucky law, it was egregious error to submit the case to the Jury, since, as matters of Kentucky law, Mrs. Sparks was negligent and Western Union was not.[6]

This Cover, with those vent holes, is a standard type, which (*a*) Is *identical* to all of Western Union's own 14,000 manhole covers in its own nationwide use since 1921 (R. 50a, 197a-200a); (*b*) Conforms to the 4,531 other manhole covers in the streets of Louisville alone, which belong to various utilities;[7] and (*c*) Con-

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[6]In *McQuillan* v. *City of New Orleans*, 18 So. 2d (La.) 218 (1944), the Court, in reversing a judgment for the plaintiff, a lady who caught her shoe heel in a sidewalk metal grating, aptly said:

> "When this grating was installed fifteen years ago the style in women's shoes might have been different and, doubtless, will be different before many years hence. It may be that our women will wear sturdier and wider shoes or it is as safe to predict narrower and flimsier ones. But must our sidewalks be altered with the prevailing mode of footgear or should the women be charged with greater or less caution as the changing styles require. We incline to the *latter* view and are constrained to hold this sidewalk is reasonably safe for the pedestrian who is reasonably shod" (p. 220).

[7]Southern Bell, 1,380 covers (R. 145a, 147a-148a, 150a); Louisville Water Co., 2,000 covers (R. 107a); Louisville Gas & Electric Co., 1,000 covers (R. 67a, 69a, 70a, 81a, 172a, 175a, 183a-184a, 199a); Western Union, 151 covers (R. 197a).

forms to the standard specifications—"which show four vent holes in the cover designs"—that American Standards Association's Committee has established for manhole covers for use throughout the country (R. 190a-191a, 193a, 198a-199a).[8]

2. That widespread "common use" of these Safety vent holes through manhole covers brings this case *directly within* Kentucky's clearly established law—which both the District court and the C.A. (6th) failed to apply—that it is *not* a negligent act for one to use or maintain a physical "thing" or "instrument" which is in "*common use*".

In *Greater Louisville 1st Fed. Sav. & Loan Assn. v. Stone*, 242 S. W. 2d (Ky.) 739 (1951), a child (too young to be chargeable with contributory negligence) severely burned his hand on an uninsulated hot radiator pipe in the Loan Association's office. The Kentucky Court held that there must be a *directed* verdict for the Association, under Kentucky's "common use" rule. It stated and applied that rule, saying:

> "In the instant case, an uncovered radiator pipe is a **thing in common use.** It is a matter of common knowledge that uninsulated radiator pipes exist *everywhere*. There is no difference in principle between an exposed radiator pipe and an unguarded hot *coal stove*. * * * No one would

[8] This Cover's vent holes are "conservative" as to number and size, in comparison with the holes in manhole covers which other utilities use "throughout the entire United States". In New York City, the Power Company's 18,000 covers for its manholes for its primary cables (and the countless thousands for its secondary cables) all have 24 vent holes in each cover, 1½ inches in diameter (R. 201a-202a).

assume, or even argue, that a country merchant would be liable to a child that came into his store and received a burn by touching a red hot stove. With reference to radiators, and likewise with hot stoves, the practice of not covering or guarding them is so *usual and widespread* that no property owner should be held to anticipate that an injury would ever occur by reason of the existence of such a *commonplace* condition."

The Kentucky Court stated the standard which must be applied, saying:

"We *cannot* read into this case positive, active negligence upon the part of appellant. The care taken by people generally to prevent injury from **instruments of common use,** is the proper criterion for courts to consider in determining what constitutes *due care* with respect to the use of such instruments. An uncovered radiator pipe is an instrument in **common use,** and it is a *standard,* approved practice to leave radiator pipes exposed. Therefore, having and keeping radiator pipes uncovered in a building, is *not* a negligent act upon the part of the possessor of property."

The Kentucky Court reaffirmed its earlier statement of the "common use" rule in *Haar v. Vogelman Bakery Co.,* 312 Ky. 307 (1950), which involved an ordinary gasoline filling station spouted can, as follows:

"The care taken by people *generally* to prevent injury from articles in **common use** is a proper guide for the courts in determining what constitutes *due care* in respect to such articles. The law does *not* exact a degree of care regarding

> any article which will make the great majority of the possessors of that article chargeable with habital or continuous negligence."

In *Ellis* v. *L. & N. R. Co.*, 251 S. W. 2d (Ky.) 577 (1952), the Kentucky Court, in referring to that rule of law, approved this statement of it:

> "Persons who are charged with a duty in relation to a particular matter or *thing* have a *right to rely* upon the sufficiency of a structure or contrivance which is in **common use** for the purpose and has been in fact safely used under such a variety of conditions as to demonstrate its fitness for the purpose."

In *McNeal* v. *City of Louisville*, 287 Ky. 83 (1941), where Mrs. McNeal, at night, caught her high shoe heel in a hole in an ordinary cover that was over a catch basin which was located at a busy street intersection, the Kentucky Court affirmed a *directed* verdict against Mrs. McNeal, saying that:

> "* * * the mere fact that plaintiff's shoe *heel* caught in the catch basin is *no* evidence of negligent construction or negligent maintenance of the catch basin in question * * *."[9]

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[9]The District Court's Opinion (which the C.A. adopted, R. 219a), asserts as the reason for not applying Kentucky's "common use" rule, that there was evidence that Louisville Gas & Electric Co. had followed a practice of dropping small removable rivets in the vent holes in some of its manhole covers (R. 17a-18a). The reason which the District Court assigned is completely *erroneous*, upon *two* grounds:

First: Kentucky's "common use" rule does *not* require that the "thing" or "instrument" in question be used universally,

(*Footnote continued on next page*)

II. Under Kentucky law, Mrs. Sparks was guilty of contributory negligence as a matter of law.[10]

1. Mrs. Sparks *knew* she was wearing high-heeled shoes, with "nickel-sized" heel taps; *knew* that "all" manhole covers "have holes in them"; *recently* had walked across this same street at this same place "at least a hundred times or more"; and could *clearly see* the vent holes in this Cover "more than four good steps" before she got to it, if she had looked (p. 2-3, *supra*).

2. The Kentucky law is that her failure to look makes her guilty of contributory negligence as a matter of law.

In *Interstate Coal Co.* v. *Deaton*, 148 Ky. 160—which the court reaffirmed in 1954 in *Cardwell* v. *Haycraft*, 268 S. W. 2d (Ky.) 916—the Kentucky Court held that Deaton was guilty of *contributory* negligence as a matter of law, where he failed to look out for the perfectly visible condition which caused his injury. It said:

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without exception; but only requires that it be in "general" or "common" use. For instance, in *City of Louisville* v. *Moore*, 267 Ky. 536 (1937)—another catch basin cover case—the particular cover in which Moore caught his shoe heel was an "old type" which, 16 years before, the City had abandoned for a "new type", but it still had 1,737 "old type" catch basins in use.

Second: The District Court completely *overlooked*, and did not mention, the uncontradicted evidence that Louisville Gas & Electric's practice of stopping up vent holes in some of its covers, with the removable rivets, simply meant (as Louisville Gas & Electric's engineer himself testified) that it was "*simply taking a greater risk of explosions*" (R. 71a-72a).

[10]The District Court's Opinion [which the C.A. (6th) adopted], completely ignored, and did not even mention, the uncontradicted evidence of Mrs. Sparks' contributory negligence (R. 14a-18a).

> "He *must* know those things which are *right before his eyes,* and which he himself admits having seen."

In *Crain* v. *City of Louisville,* 259 S. W. 2d (Ky.) 52 (1953), the Kentucky Court held that Mrs. Crain was **guilty of contributory negligence as a matter of law,** when she caught her foot and fell (at night) on a defective sidewalk, which she knew about, but to which she "never gave a thought" as she walked along with a companion. The Court pointed out that "one who walks over such a street with knowledge of its condition" must exercise care for "his own safety"; and **expressly overruled** all of its earlier decisions to the contrary, saying:

> "Mrs. Crain was fully *aware* of the defective condition of the sidewalk, and we do *not* think that she should be excused from **contributory** negligence by saying that she *never gave a thought* to the defect as she was walking along the street with Miss Pence. Those cases where there has been a contrary ruling, when the injured person had full knowledge of the defect in the sidewalk, are hereby **overruled.**"[11]

[11]Among the earlier cases which were thus *overruled,* are *Monroe* v. *City of Louisville,* 278 Ky. 648 (1939) and *City of Louisville* v. *Verst,* 308 Ky. 46 (1948), upon which Mrs. Sparks has always relied.

Second.

The decision of this Kentucky Question is *important;* because, the unique and unprecedented decision of the Court of Appeals *jeopardizes* the future use of Safety vent holes in manhole covers.

The uncontradicted evidence is that explosive gases (which also are deadly to workmen) tend to accumulate in manholes. Unless manholes are vented, those gases give rise to dangers of explosions and fires. An unvented manhole "becomes a safety hazard on the streets" (R. 70a-72a, 109a-111a, 124a, 137a, 176a, 195a).

If this C.A. decision stands, (1) All utilities and cities which have to have manholes will stand convicted in advance of "habitual or continuous negligence"—a burden which the Kentucky Court rejects (p. 9-10, *supra*); or (2) They must abandon use of Safety vent holes in manhole covers and thus subject all large cities to the grave hazards of explosions.

As far as reported cases show, *never* has *any* court anywhere ever before allowed recovery to anybody for an injury from catching a shoe heel in a manhole cover's vent holes; and as far as our research has disclosed, *never* before has *anyone* brought suit seeking recovery for such an injury.

The implications of the decisions of the District Court and Court of Appeals (6th) go far beyond the $18,000 amount of this Judgment. They *jeopardize*

safety precautions which, for *fifty* years, have been *imperative* everywhere.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

June 21, 1957.

Certificate of Service.

I, Wm. Marshall Bullitt, counsel for The Western Union Telegraph Company, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 9, 1957, I served the foregoing Petition for Writ of Certiorari on the respondent, Mary Ruth Sparks, by that day depositing a copy thereof in a United States post office in a duly addressed envelope, with first class postage thereon prepaid, addressed to her counsel of record, John P. Sandidge, Esq., at 1805 Ky. Home Life Building, Louisville, Ky.

WM. MARSHALL BULLITT,
Counsel for The Western Union Telegraph Company,
1700 Ky. Home Life Building,
Louisville, Ky.

APPENDIX

Judgment of District Court [Brooks, J.]
[Entered June 11, 1956]

The jury having returned its verdict awarding plaintiff $18,000.00 against defendant,

It Is Now Ordered and Adjudged that plaintiff, Mary Ruth Sparks, recover of defendant, Western Union Telegraph Company, $18,000.00 with interest thereon at 6% from this date until paid, together with her costs herein, for all of which she may have execution.

Judgment of the U. S. Court of Appeals [6th Cir.]
[Entered April 23, 1957]

The above cause coming on to be heard upon the record, the briefs of the parties, and the arguments of counsel in open court; and it appearing that the jury's award of damages was not excessive; that the instructions given by the district court to the jury properly placed before it the issues in the case, when considered as a whole; and the court being duly advised.

Now therefore, it is Ordered, Adjudged and Decreed that the judgment of the district court be affirmed, on the opinion of Judge Brooks overruling appellant's motion to set aside the verdict of the jury and to enter judgment in accordance with appellant's motion for a directed verdict, as reported in 141 F. Supp. 328, which is hereby adopted as the opinion of this court.

Order of U. S. Court of Appeals [6th Cir.] Denying Rehearing
[Entered May 30, 1957]

The petition for rehearing is denied.

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - Petitioner,

versus

District Court decision, 141 F. Sup. 328.
C. A. 6th Cir. decision, 244 F. 2d 956.

MARY RUTH SPARKS, - - - - - Respondent.

REPLY BRIEF

OF

WESTERN UNION TELEGRAPH COMPANY.

Upon Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

WM. MARSHALL BULLITT,
Counsel for Petitioner.
Address: 1700 Ky. Home Life Bldg., Louisville 2, Ky.

JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

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Supreme Court of the United States

October Term, 1957

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, - - - - - - - - *Petitioner,*

v.

MARY RUTH SPARKS, - - - - - - *Respondent.*

WESTERN UNION'S[1] REPLY BRIEF.

Mrs. Sparks' 39-page brief, in opposition to this Court's review of her case, is an elaborate attempt (I) To make smidgens of evidence, which are too inconsequential to show any Western Union negligence, appear to raise a jury issue on that score; (II) To base completely illogical arguments upon what she calls a "trend" on the part of one utility to stop up the Safety vent holes in its manhole covers; and (III) To beeloud her own admissions, in her own testimony, of her own contributory negligence as a matter of law. Only a few of her arguments merit comment, on this petition for *certiorari.*

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[1]For brevity, the Petitioner is called "Western Union" and the Respondent is called "Mrs. Sparks".

I. Manhole covers, with "quarter-sized" *open* vent holes through the covers, do *not* present any unreasonable risk of injury to anyone, despite Mrs. Sparks' argument about the Louisville Gas and Electric Co. "trend" toward dropping removable rivets in the vent holes in some of its manhole covers.

The basis for Mrs. Sparks' argument that manhole covers with open holes through them present a risk of injury, is what she calls a "trend" on the part of Louisville Gas and Electric Co. to drop removable rivets into the holes in some of its covers.

However, any such "trend", even if it existed,[2] does

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[2] The uncontradicted evidence is that the "trend" on the part of Louisville Gas and Electric Co. toward plugging the holes is that any such practice is a specious, haphazard and dangerous expedient.

First, that Company's own engineer, Mr. Jaegle, testified that "*generally* the practice has been **to have holes** in the tops of manhole covers" (R. 79a); that "at least 99% of all" of his own Company's manhole covers "have at least one hole clear through the cover" (R. 79a); and that even when his Company drops removable rivets in the holes "we find people take them out quite frequently" (R. 74a).

Second, a detailed study of Louisville Gas and Electric's 40 manhole covers in the streets which radiate one city block in length, in the four directions, from where Mrs. Sparks fell, showed that there were not any rivets in any of the vent holes in those 40 covers (R. 130a-131a, 133a-134a, 141a-143a); and a detailed study of that Company's 32 manhole covers (with a total of 153 holes in the covers) in a 4-block area of Fifth Street (terminating only one square from where Mrs. Sparks fell) showed that all the holes were open "right straight through the full thickness" of the 32 covers (R. 164a, 166a, 167a, 171a).

Third, Mr. Jaegle condemned his own Company's "trend", when he testified that one purpose of having "open holes in the top" of a manhole cover is to "ventilate" the manhole (R. 80a), and that when the vents are reduced "you are simply taking a **greater risk** of explosions" (R. 71a-72a). Thus, he agreed with the testimony of Mr. Meiners, Director of Works, that a manhole without vent holes "becomes a *safety hazard* on the streets of the city of Louisville" (R. 124a).

not conflict with the plain fact that covers with **open** holes involve so little risk that it is shocking to leave to a jury any issue about them. Mrs. Sparks' brief admits (p. 28) that only about "one-fifth of the manhole covers" in Louisville belong to the Gas and Electric Company or have ever been so "protected" (as she describes it) by plugging them with its removable rivets. Certainly, when the remaining four-fifths or 80% of all manhole covers have *open* holes, just as intended by the manufacturer, every reasonable person must concede that such widespread use of the *open* vent hole type does not create any unreasonable risk—even apart from any common use rule.[3]

Mrs. Sparks cites Mr. Jaegle's testimony as support for her assertion (p. 4) that "There is no common practice in Louisville concerning whether covers for manholes should have holes or not". She fails, however, to reveal to the Court that Mr. Jaegle testified that "down to and including this very day",

> "while there may be some exceptions, *generally* the practice has been *to have holes* in the tops of manhole covers" (R. 79a).

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[3]The Kentucky "common use" rule applies to *physical* "things" or "instruments" or "appliances" such as a manhole cover (*Certiorari* Petition, p. 8-10), which must be distinguished from a "procedure" or "process" or "method" under some *custom* as in *T. & P. R. Co.* v. *Behymer*, 189 U. S. 468, *C. R. Herme, Inc.* v. *R. C. Tway Co.*, 294 S. W. 2d (Ky.) 534, 537, and *Empire Oil & Refining Co.* v. *Hoyt*, 112 F. 2d 356, 361, upon which Mrs. Sparks relies (pp. 16; 28). That is a distinction which Mrs. Sparks' brief repeatedly ignores, refuses to recognize, and attempts to confuse (see pp. 16-17, 25-28).

II. Mrs. Sparks' argument which she bases upon the "trend" on the part of Louisville Gas and Electric Co is completely illogical.

1. Mrs. Sparks, while asserting that widespread usage of a "thing" or "instrument" is not conclusive on the issue of negligence, illogically attempts, on the whole, to make it appear as if Louisville Gas and Electric's so-called "trend"—even if it exists in any measureable degree in respect of any appreciable number of its one-fifth of the manhole covers in Louisville—itself establishes the legal standard of care in relation to the design of the remaining four-fifths of the manhole covers (including Western Union's). At the same time, she refuses to recognize that pursuit of such a "trend", while a precaution greater than the law requires to prevent a carelessly shod inattentive lady from catching her shoe heel in a vent hole, also involves "taking a *greater* risk of *explosions*" (R. 71a-72a).[4]

Her argument further shows unwillingness to concede the importance of the impressive fact that no other accident such as this has ever before occurred from *open* vents in the remaining four-fifths of Louisville's manhole covers—which admittedly have open vent holes.

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[4]Mrs. Sparks repeatedly asserts that Mr. Meiners, Director of Works, had never complained of "a danger of gas explosion resulting from the practice" of plugging up vent holes (pp. 6, 8, 29); but she does *not* reveal to the Court that Mr. Meiners did *not* know, until the trial, that Louisville Gas and Electric had followed any such "trend" (R. 124a).

2. Mrs. Sparks says (p. 37) "the only issue involved" is "the question whether or not these covers may be placed as traps in intersections". It is respectfully submitted that the lack of any other similar cases—a lack which renders the question involved herein a novel one[3]—belies her statement of the issue. Indeed, her statement of the issue, and her description of a manhole cover with vent holes in the cover as a "trap", appear to Western Union quite ironical, since there are fully 20 appliances of various sorts, including a full dozen manhole covers equipped with *open* vent holes, in the intersection (where its Home Office is located) of West Broadway and Thomas Street, in New York City, which is widely known as the most crowded, congested and claim conscious community in Eastern United States.

3. On the one hand, Mrs. Sparks asserts that "all" parts of a street must be "kept in safe condition for pedestrians" who "may cross the street at any point without imputation of negligence" (p. 31); but on the other hand she asserts that this case "doesn't concern manhole covers in other portions of the street" but only those "in crosswalks where great numbers of people walk" (p. 37). Thus, she regards the issue of negligence as one peculiar, not only to Louisville, but to crosswalks in that city, and not only to crosswalks, but to crosswalks in its downtown intersections. The issue of negligence *vel non* cannot be so narrowly viewed. Her assertions are illogical. They amount to

[3]Which is hardly the kind of case to be disposed of by a *per curiam* memorandum decision.

a contention that the applicable standard of care must vary not only from one part of the street to another, but from one part of town to another, and from one part of the country to another.

Changing conditions may affect the applicable standard; but the proposition that a type of manhole cover which is safe in one part of one street in one city, is unsafe somewhere else in the same street in the same city or in some other city, simply does not make sense. She asserts (p. 16) "The question is not what is the standard of care in New York or Cincinnati, but what is the standard of care in Louisville, Kentucky, concerning the hazard here involved". Such inappropriate language does not deserve to be taken seriously.

Neither does the "trend" to which she refers make the proposition any more sensible. Her statement (p. 24) that "it cannot be said, as a matter of law, that this preventative action by this reputable company was not what a reasonable man would do", has neither legal nor factual significance. The true question is, whether, as a matter of law, Western Union's use of covers with open vents (a use which is frequent, commonplace and widespread not only in Louisville but all over the country) is *not* negligent, as Western Union contends. That is the hinge upon which the decision must turn.

4. As Mrs. Sparks was injured, it would be idle to deny that the presence of safety vent holes in manhole covers involves *some* risk to carelessly shod and inattentive ladies who do not look where they are going; but as shown in the *certiorari* petition (p. 13), that is a risk so small as not to be measurable—a risk which,

as a matter of law, is not an unreasonable risk or one which keeps the street from being reasonably safe for pedestrians. That is why, as stated in the *certiorari* petition (p. 6-10) it was egregious error to leave to the jury the issue of Western Union's negligence *vel non*.

5. *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, completely justifies this Court's review of this case, by granting *certiorari* upon the ground of Western Union's proposition that there was no jury issue on the question of Western Union's negligence. In that case, the District Court denied Southern Railway's motion for a directed verdict upon the ground of its non-negligence; and the Circuit Court of Appeals affirmed the $28,000 judgment against Southern Railway [47 F. 2d 3]. This Court, however, granted *certiorari* [283 U. S. 815]; and then *reversed* the judgment upon the ground (which appeals to all practical minded men) that the evidence of Southern Railway's negligence, although coming from seven witnesses,

> "was so *insubstantial* and insufficient that it did **not** justify a submission of that issue to the jury" [284 U. S. at 194].[6]

6. In Mrs. Sparks' brief, she does not seem to recognize that the issue of negligence *vel non* is an issue

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[6]Mrs. Sparks, in discussing Kentucky's "common use" rule, comments that it would be more apt to call it the "obvious danger rule", and incorrectly states the rule "is never applied to an instrument" that "does not have the obvious capacity for hurt and injury". That statement hardly makes sense, in light of the fact that the Kentucky court *did* apply it to an exposed hot water return pipe in the *Greater Louisville* case (*Certiorari* Petition, p. 8-9), against a 2-year-old child to whom the pipe could **not** have had "an obvious capacity for hurt and injury".

of law, when only one *reasonable* result can be reached (1 Sherman & Redfield, Negligence, 6th Ed., Section 56, and cases therein cited). Federal courts are not loathe to remove that issue from the jury when, in their view, only one conclusion can reasonably be drawn from the facts (p. 11-12, *infra*).

Western Union should have been held, as a matter of law, not to have been negligent. To confide the issue of its negligence to a jury in a case such as this appears to practical minded men to be, in effect, a denial of due process if it be agreed that the issue of negligence *vel non* was, as Western Union contends, an issue of law.[7]

7. Mrs. Sparks' assertion (p. 5) that Western Union "does not use in all locations manhole covers with vents in them" is misleading, as indicating that the number of its covers without vents is extensive. In truth, Mr. Markley, upon whose testimony her assertion is based, testified that it uses only a "*very small*

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[7]The cases which Mrs. Sparks cites at her brief's pp. 14-15 involved appliances which, when installed, were completely safe, but became **out of repair.** (Mrs. Sparks does not claim that Western Union's manhole cover was out of repair.) Moreover, the *Holbrook* case [157 So. (La.) 566] must be regarded as having been overruled ten years later in *McQuillan* v. *City of New Orleans*, 18 So. 2d (La.) 218; and the *Upham* case [187 Mass. 220] must be regarded as having been overruled by *Corthell* v. *Great A. & P. Tea Co.*, 291 Mass. 242, in which the Court applied the same "common use" rule which prevails in Kentucky to a hot air floor register in which a lady's shoe heel caught but which the court described as a type "in common and general use", and said:

> "When the court can see that the *physical* facts, with any other evidence that may exist, do *not* warrant the inference that a reasonable man in the position of the defendant would have anticipated danger and guarded against it, a verdict for the plaintiff is *not* warranted".

number" of covers without vents. Its occasional use of those is *only* in "low" places, to guard against wash of mud and dirt, and then *only* where other nearby manholes in the same line "which have vents" sufficiently vent the line (R. 198a). Similarly, her reference to the Sewer Commission as using sewer caps without vents is misleading, in light of the fact that out of the ten sewer caps in the four-block area in which Mrs. Sparks fell (R. 126a, 138a-139a) only *one* was without vents (R. 131a, 139a).[8]

III. Mrs. Sparks' attempt to becloud her own admissions, in her own testimony, of her own *contributory negligence* as a matter of law, explains but does not sustain her opposition to this Court's review of her case.

1. Mrs. Sparks actually **admitted,** in her own testimony, that "for *many* years", she had "*seen* many of those round covers on manholes" "all over Louisville"; had "observed they have *holes* in them" (R. 49a); knew that "*all* of them have *holes* in them" (R. 50a); during a recent three months' period, at least "twice a day" "every day" she had walked over precisely this *same* crosswalk going to and from work, "at least a *hundred* times or more" (R. 26a-27a, 34a, 46a); and could *see* the manhole cover itself half way or all the way across the street (R. 47a, 53a) and "those

[8]That one sewer cap is *not* located in a crosswalk, as claimed by Mrs. Sparks (p. 20); and is *not* shown in Plaintiff's Exhibit 3, to which she refers. An analysis of the testimony will clearly show that the object which she claims that exhibit shows to be a sewer cap *actually* is the familiar solid cover (much smaller than a manhole or sewer cover) over the hollow shaft to a water main cut-off valve.

"*holes* were *visible*" to her "more than four good steps" before she stepped on the cover (R. 48a)—if she had looked.

Due care for her own safety required her to look where she was going. She *knew* she was wearing high-heeled shoes with "nickel-sized" heel taps, which were small enough to catch in one of the average "quarter-sized" manhole cover vent holes in this street, with which she was so intimately familiar.

The Kentucky *contributory negligence* law is that a plaintiff

> "*must* know those things which are *right before his eyes*, and which he himself admits having seen" (*Interstate Coal Co.* v. *Deaton*, 148 Ky. 160, 164).

Therefore, the uncontradicted evidence—Mrs. Sparks' own trial admissions—of her own **contributory negligence,** brings her directly under the *Crain* case (*Certiorari* Petition, p. 12),[9] which held that Mrs. Crain was guilty of contributory negligence *as a matter of law,* when she caught her foot on a defect in a sidewalk, which she knew about but to which she "never gave a thought" because her attention was diverted by conversation with a companion. Mrs. Crain fell at night; Mrs. Sparks fell in broad daylight.

That uncontradicted evidence brings her case directly under the same rule in Federal courts, that when only a conclusion of contributory negligence can *reasonably* be drawn from the facts, the issue of con-

[9] *Crain* v. *City of Louisville*, 259 S. W. 2d (Ky.) 52.

tributory negligence must be taken from the jury by a *directed* verdict for the defendant. That rule is dramatically illustrated in *Stoffel* v. *N.Y., N.H. & H. R. Co.*, 205 F. 2d 411 (C.A. 2d Cir.), *certiorari* denied, 346 U. S. 898. The District Court had denied a directed verdict against Stoffel, and (as here) submitted to the jury the issue of his contributory negligence. After a verdict in his favor, it denied (as here) the railroad's motion for judgment notwithstanding the verdict. On appeal, the Court (in an opinion by Judge Hand) held (*a*) That Stoffel's failure to determine whether the high tension wire, which he knew was swinging less than six feet from the top of a crate on which he was standing, had been "de-energized"—and on which he was severely burned from contact with it—made him guilty of contributory negligence as a matter of law; (*b*) That a verdict should have been directed *against* him; and (*c*) That the judgment must be "*reversed* and the case remanded with *directions* to enter judgment for the defendant."

The Court said:

> "The failure of the plaintiff to take an elementary precaution for his own safety by inquiring whether the wire was de-energized before starting to work near it was in our opinion *contributory negligence as a matter of law*. [Citations omitted] We think it just as unreasonable to come into close proximity to a high tension wire without bothering to inquire whether it is alive as it is to proceed in a strange unlighted place without investigating the possible dangers. [Citations omitted] Had the plaintiff made inquiries and proceeded with

his work knowing of the danger to which he was exposed, he *plainly* would have assumed the risk * * *" (p. 412).

As there, so here.

Mrs. Sparks admittedly "knowing of the danger" of stepping with her "nickel-sized" heel taps (which she knew were on her shoes) onto a manhole cover with vent holes through the cover (which she herself testified she knew "all" manhole covers have in them), nevertheless did so, admittedly without looking, and therefore, as said in the *Stoffel* case, "plainly" "assumed the risk".

2. Mrs. Sparks, in opposing this Court's review of her case, attempts to becloud her positive admissions of her *contributory negligence* (p. 9-10, *supra*), by such arguments as she "did *not* see the hole" before she fell; "the holes in it were *not* visible to her"; "she does *not* remember seeing this manhole previously" on the hundred or more prior recent occasions she had walked over this same crosswalk, and she "had *not* previously observed" any danger in the crosswalk (p. 2, 3, 31).

Her trial testimony belies her beclouding arguments—including her belabored excuse for not looking, that she had to be "on the lookout for automobiles" (p. 32-34).

Contrary to Mrs. Sparks' present argument (p. 30-31), there was *not* any automobile traffic moving "across or through or around the intersection" in the portion of the street where she fell. She was crossing

Market Street (which runs east and west) walking south *along* the *east line* of Fourth Street (which runs north and south). She expressly testified that there was "not" any "traffic moving across the intersection", "at the time I was crossing", and that east and west traffic on Market Street had "stopped" (R. 28a).

South bound traffic on Fourth Street was not permitted to turn left into Market Street. Any north bound traffic on Fourth Street, which was permitted to turn right, to travel in the *south* traffic lane for *eastbound* traffic on Market Street, could not possibly interfere. That is positively *established* by the fact that she fell on the manhole cover which is shown as figure 1 on the Exhibit "Trial Map" (R. 50a). That Exhibit shows that the cover is located in the *Northern* one-third of Market Street—far *north* of Market Street's eastbound traffic lane (which is along the *south* half of that street).

Those uncontradicted *physical* facts condemn and disprove her present argument. She simply *did not look*. Her excuse is completely *specious*.

3. Mrs. Sparks cites (p. 33-34) the *Monroe* case (1939),[10] and says that the *Wheeler* case (1945),[11] "as to divergence of attention from defect", and the *Verst* case (1948),[12] "as to knowledge of defect", are the cases "making the question of contributory negligence" a jury question. The trouble is, in the later 1953 *Crain* case (*Certiorari* Petition, p. 12; p. 10,

[10] *Monroe* v. *City of Louisville*, 278 Ky. 648.
[11] *City of Louisville* v. *Wheeler*, 301 Ky. 222.
[12] *City of Louisville* v. *Verst*, 308 Ky. 46.

supra),[13] the Kentucky Court expressly *overruled* not only the *Monroe* case, upon which the decisions in both the *Wheeler* and *Verst* cases were based, but also all "those cases where there has been a contrary ruling", which includes the *Wheeler and Verst* cases.

No sophistry can reasonably avoid the conclusion of Mrs. Sparks' contributory negligence as a matter of law, under the *Crain* case. It is idle for her to undertake, as she does (p. 34), to distinguish it upon the ground that it was not shown that Mrs. Sparks "had actual knowledge of the dangerous characteristics of the defendant's manhole cover". She testified that she *knew* "all" manhole covers had holes in them; *knew* about her "nickel-sized" shoe heel taps; had walked "a hundred times or more" over this same crosswalk; and the vent holes were perfectly *visible* to her—if she had looked (p. 9-10, *supra*).

CONCLUSION.

I. Even if the "common use" rule did not prevail in Kentucky, it would still have been egregious error to submit to the jury any issue of negligence on the part of Western Union. Vented manhole covers do not present an unreasonable risk of injury to pedestrians who exercise the slightest care for their own safety. They are not dangerous, obviously or otherwise, and during the long years they have been in such widespread use, Mrs. Sparks' injury on one is a novelty.

[13] *Crain v. City of Louisville*, 259 S. W. 2d (Ky.) 52.

Western Union should be held non-negligent as a matter of law.

II. Mrs. Sparks should be held contributorily negligent as a matter of law, upon the basis of her own trial admissions.

WM. MARSHALL BULLITT,
Counsel for Petitioner.

JOHN H. WATERS,
Of the New York Bar,
General Attorney of Petitioner,
Of Counsel.

September 12, 1957.

Certificate of Service.

I, Wm. Marshall Bullitt, Counsel for The Western Union Telegraph Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on September 17, 1957, I served the foregoing Reply Brief upon the Respondent, Mary Ruth Sparks, by that day depositing a copy thereof in a United States Post Office, in a duly addressed envelope, with first class postage thereon prepaid, addressed to her counsel of record, John P. Sandidge, at 1805 Ky. Home Life Building, Louisville, Ky.

WM. MARSHALL BULLITT,
1700 Ky. Home Life Bldg.,
Louisville, Ky.,
Counsel for The Western Union Telegraph Company.

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Supreme Court of the United States

October Term, 1957.

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner,*

v.

MARY RUTH SPARKS, - - - - *Respondent.*

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices, of the Supreme Court of the United States.

The petition for Certiorari in this action should be denied because the District Court and the United States Court of Appeals for the Sixth Circuit have applied the law of the State of Kentucky correctly, and the decision is not in conflict with the applicable law of the State of Kentucky. Therefore, clearly under Rule 19(b), Supreme Court Rules, the Petition for Writ of Certiorari should be denied.

I. COUNTER-STATEMENT OF THE CASE.

Since a complete statement of the facts of the case was not given, it will be necessary to restate the facts.

On March 8, 1954, Mrs. Sparks left her home for the purpose of going to work at Bacon's Department Store. Mrs. Sparks is 46 years of age (R. 25a). After transferring from one bus to another she got on a bus in which she rode north on Fourth Street to Market Street, where she got off the bus on the northeast side of the intersection of Fourth and Market Streets (R. 27a). Mrs. Sparks then started towards her employment, which is located on the south side of Market Street and proceeded to cross Market Street in the east crosswalk (R. 27a). The crosswalk is plainly marked with white lines and is a very busy intersection (R. 27a). Mrs. Sparks had walked upon this crosswalk before on her way to work, but she had not been across this intersection for better than two months (R. 47a) prior to the accident. She had not previously observed any obstruction or danger in the crosswalk (R. 27a). She was walking with the green traffic light (R. 28a), which was in her favor as well as with automobile traffic moving across the intersection (R. 28a). There were automobiles moving north and south on Fourth Street, and it is permissible for north bound automobiles on Fourth Street to turn right into Market Street, which would require them to go across the crosswalk in which she was walking. There were automobiles on all four corners of the intersection, and Mrs. Sparks, as she proceeded to walk

southwardly on the east side of Market Street in the crosswalk, was watching and observing the traffic that was ready to start across, approaching, through or around the intersection (R. 28a). While so proceeding, her left heel became caught in one of the holes in a manhole cover belonging to the defendant (R. 29a). The holes go all the way through the cover. She did not see the hole prior to the time that her foot caught in it (R. 29a). Her shoes were introduced into evidence (Plaintiff's Exhibit 1, R. 25a). These shoes contained a metal plate the purpose of which is to keep the heels from breaking off (R. 29a). The shoes that she wore were exhibited to the jury, and they are of the ordinary and usual type for a lady to wear on the street. The heel is approximately three inches in height, and the bottom of the heel is approximately seven-eights of an inch across (R. 14a). The result was that she was caused to fall and her right knee cap was broken (R. 30a).

Upon cross-examination, Mrs. Sparks testified that her eyesight was good (R. 47a), but she testified that she was not looking directly for the manhole cover, and that the holes in it were not visible to her (R. 47a-48a). She stated that she had observed previously manhole covers which had holes in them (R. 50a). Plaintiff does not know exactly which hole in the manhole cover her foot caught in, but she does know that her foot caught in a hole in this particular cover (R. 52a, 53a). Although she had crossed the street previously, she does not remember seeing this manhole cover previously (R. 52a).

The intersection is shown in Plaintiffs' Exhibit 3, (R. 25a), and the particular manhole is shown in Plaintiff's Exhibit 2 (R. 25a). As to the particular manhole cover involved, there are four holes around the center (R. 14a, 52a). The hole involved is one and one-sixteenth inches across in diameter (R. 127a). It is to be further noted from the Exhibit 3 (R. 25a) and the testimony that the manhole cover involved is directly in the crosswalk (Defendant's Trial Map, Exhibit 1, R. 51a) at a busy intersection (R. 53a). It is to be further noted from Plaintiff's Exhibit 3 (R. 25a) and the defendant's own testimony (R. 131a) that in this intersection there is also one manhole cover that does not have any hole in it which belongs to the Sewer Commission (R. 139a).

There is a strict conflict in the evidence concerning the proper method of maintaining manhole covers, especially when they are located in busy intersections. There is no common practice in Louisville concerning whether covers for manholes should have holes or not (R. 79a), for some companies do and some companies do not. The modern trend is for manhole covers to have no holes in them, or one hole or holes with a removable rivet (R. 65a). It was established that the Louisville Gas & Electric Company has over one thousand manhole covers (R. 67a) in the City of Louisville while Western Union has about 150 (R. 197a). Louisville Gas & Electric Company maintains approximately one-fifth of the manholes in the City of Louisville (R. 16a-17a; 107a, 119a). For a period of better than ten to fifteen years the Louisville Gas & Electric

Company has followed the practice of plugging up the holes in the manhole covers with a flattop rivet (R. 68a-179a). These rivets may be withdrawn easily by the employees for the purpose of placing an iron metal bar under the cap in order to lift it (R. 67a). These rivets are placed in the holes and are squared off so that there is no chance for anyone stumbling upon it. Louisville Gas & Electric Company officials were asked and did go onto the street and report on the rivets being in the covers when located in intersections or places where people walk and reported the presence of the rivets in the holes (R. 181a-182a; 73a, 75a-79a).

In the defendant's proof it was also admitted by Mr. W. F. Markley, its Assistant Lines Engineer, that the Western Union Telegraph Company does not use in all locations manhole covers with vents in them; however, their prime consideration for using such a manhole cover had nothing to do with the safety of pedestrians, but whether the location of the manhole was such as to cause considerable wash into the manhole from heavy rain bringing in water, mud, and dirt (R. 198a). However, clearly both types of covers are in use, and the vent holes are optional according to Western Union's own expert (R. 193a).

The present manhole here involved was first built in 1909 (R. 199a). and contained ten holes approximately one-inch in diameter. In 1914 (R. 199a) the manhole was changed and it provided twelve holes approximately one-inch in diameter. In 1920 (R. 199a-200a) the manhole cover was again changed and

had only one hole. In 1927 it was again changed to where it has four holes (R. 200a).

While there was testimony on behalf of the defendant concerning the various types of manhole cover in the City of Louisville by alleged expert witnesses, it is to be noted that these witnesses did not hold up on cross-examination. Mr. H. T. Meiners affirmed that the Louisville Gas & Electric Company and the Southern Bell Telephone Company have the greatest number of manhole covers in the City of Louisville (R. 119a). He admitted that he made no complaint for safety reasons to the Louisville Gas & Electric Company, because it had stopped up the holes in its manohle covers with rivets (R. 124a).

Mr. W. M. Goforth, City Foreman for Western Union, testified that at Fourth and Market there was one manhole that had no holes in it, and this cover was over a sewer (R. 131a). (See Reed, R. 139a.) Mr. Verne Quinn, of the Southern Bell Telephone Company, testified, concerning the Southern Bell Telephone Company's manhole cover, that within the last five years the Southern Bell Telephone Company has not installed in any crosswalk a manhole cover containing holes (R. 154a-155a).

Mr. William Marshall Bullitt made an independent investigation and testified that he had received the report from one of his associate lawyers in preparation of the case that in the principal parts of Louisville the covers on the manholes did not have holes in them (R. 160a), but that he went out to disprove the matter. Mr. F. W. Russell, Vice President in Charge of Opera-

tions at Louisville Gas & Electric Company, was called on behalf of the defendant and testified (R. 178a-179a) without contradiction upon cross-examination that for about fifteen years it has been the accepted practice of the Louisville Gas & Electric Company to drop rivets in the one hole that is in the Louisville Gas & Electric Company's cap for purposes of removal in order to protect from the hazardous condition created by the hole, especially in the crosswalks in Louisville. Such instructions are given to the underground department and have been in effect for some fifteen years (R. 179a). Mr. W. F. Markley, Western Union's expert, further testified that in particular situations where it is necessary to have solid caps over the manholes that other manhole where there are vents will take care of the one that does not have vents as far as circulation of air is concerned (R. 198a).

It is uncontradicted that there is an Ordinance in the City of Louisville that requires underground wires in the business district (R. 85a).

There is a conflict of evidence as to the necessity for having holes in the manhole covers for purposes of circulation to prevent explosions. Even though a manhole has holes in the cover, it will still have gas in it (R. 181a, 206a). It is clearly established that the sewer gas or gases caused from natural causes in the ground are heavier than air and will remain in the sewer regardless of the number of vents in the manhole cover (R. 180a). If there is any leakage from the gas lines of the Louisville Gas & Electric Company that is lighter than air, it will come to the top (R. 180a).

However, there is a conflict of evidence on the point as the plaintiff introduced evidence to the effect that the caps do not fit tightly and that this gas may go out around (R. 166a) the edges of the cap (R. 181a). Or, in the case of the Louisville Gas & Electric Company where rivets have been placed in the holes, the gas will go around the outside of the rivets, as the rivets are not placed tightly. It was established upon cross-examination of Mr. H. T. Meiners that he made no complaint as to the method used by the Louisville Gas & Electric Company in preventing the hazard to pedestrians as being unsafe and causing explosions (R. 124a).

As the result of the accident, Mrs. Sparks' right knee cap was broken (R. 30a) and her back was twisted. As to hospital, medical, surgical, transportation and help for herself, Mrs. Sparks proved bills in the amount of $2,323.65, and loss of wages from March 8, 1954, to September 12, 1954, in the sum of $1,343.00.

The Trial Court submitted the case to the jury after overruling the defendant's motion for a directed verdict. The jury returned a verdict in the amount of $18,000.00—$2,300.00, hospital and doctor bills; $1,300.00, loss of time; $14,400.00, damages (R. 10a). Western Union made a motion for judgment notwithstanding the verdict and for a new trial (R. 10a-12a), which the District Court overruled (R. 19a) on the basis of an opinion concerning his views of this case (R. 14a-19a; *Sparks* v. *Western Union Telegraph Company,* 141 F. Supp. 328). The case was then appealed to the United States Court of Appeals for the

Sixth Circuit which affirmed the judgment of the District Court (Appendix to Petition, page 15), adopting the Opinion of Judge Henry Brooks of the Western District of Kentucky as its own.

II. QUESTIONS PRESENTED.

1. Did the District Court correctly refuse to direct a verdict for Western Union Telegraph Company under the "Common Use Doctrine" because there was a conflict of evidence where the plaintiff's proof showed that other public utility companies in the City of Louisville, Kentucky, capped their manholes when located in crosswalks in such a way that there were no holes present which would catch the heel of a woman walking over it, and Western Union Telegraph Company did not follow this practice but placed manhole covers in crosswalks with holes in them that acted as traps to pedestrians, especially women wearing shoes with small heels?

2. Should the District Court have directed a verdict for Western Union Telegraph Company upon the ground that Mrs. Sparks' injury was caused by her own contributory negligence when she was crossing for the first time in two months a busy intersection in the crosswalk while watching for vehicular traffic that may turn in her path and inadvertently steps upon a manhole capped by a cover containing holes which caught her heel?

III. REASONS FOR DISALLOWANCE OF THE WRIT—ARGUMENT.

FIRST—INTRODUCTION.

The Court of Appeals for the Sixth Circuit decided this case correctly on the applicable Kentucky law as it was required to do under the authority of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, since jurisdiction of this case was based on diversity of citizenship.

SECOND.

A. Did the District Court correctly refuse to direct a verdict for Western Union Telegraph Company under the "Common Use Doctrine" because there was a conflict of evidence where the plaintiff's proof showed that other public utility companies in the City of Louisville, Kentucky, capped their manholes when located in crosswalks in such a way that there were no holes present which would catch the heel of a woman walking over it, and Western Union Telegraph Company did not follow this practice but placed manhole covers in crosswalks with holes in them that acted as traps to pedestrians, especially women wearing shoes with small heels?

Under the Kentucky law as analyzed by a Kentucky Judge (141 F. Supp. 328) a jury issue was presented as to whether or not Western Union was negligent in not meeting its continuous duty to properly maintain the manhole covers in a reasonably safe condition for pedestrians using the crosswalk in 1954.

The Petition contends in this case that the Circuit Court of Appeals and the District Court did not correctly apply the Kentucky law. It has been said by various Circuit Court of Appeals in reviewing diversity of citizenship cases which are determined on local state law that they should defer to the opinion of the Trial Judge who has been a lawyer of long standing in the State. This is particularly true of Judge Henry Brooks of the United States District Court for the Western District of Kentucky who tried this case. Judge Brooks has been a practicing Kentucky lawyer ever since he was admitted to the Bar with the exception of the military service. He has been a Circuit Judge in Kentucky and the trying of cases under Kentucky law is not a new matter to him. *Standard Brands, Inc.* v. *Bateman,* 184 F. 2d 1002, 1011 (C. A. 8th); *Nolley* v. *Chicago, M., St. P. & P. R. Company,* 183 F. 2d 566, 572 (C. A. 8th); *Fargo National Bank* v. *Agricultural Insurance Company,* 184 F. 2d 676, 683 (C. A. 8th); *Hope Flooring & Lumber Company* v. *Boulden,* 227 F. 2d 303, 305 (C. A. 8th). However, after reading the Trial Court's Opinion in this matter, it is respectfully submitted that there is no doubt that the Kentucky law and the evidence justified the submission of the case to the jury. Most of the cases cited in this Petition are distinguished in that Opinion by the very language of the decisions themselves. Admittedly, there was a conflict of evidence but this simply makes a jury issue.

It is the duty of the utility when it constructs a manhole for its own use and benefit, even though it has

a license from the City, to build it in a reasonably safe manner and to maintain it in a reasonably safe condition. It is under a continuous duty to exercise care to keep and maintain the manhole cover in such condition so that the road would be in reasonably safe condition considering the uses and travel to which it might be reasonably anticipated it would be subjected to in the future, and to take notice of future travel and exercise such care as might be necessary to maintain the cover in a reasonable safe condition to meet these requirements. *McWilliams* v. *Kentucky Heating Company,* 166 Ky. 26, 179 S. W. 24, 27; *City of Lebanon* v. *Graves,* 178 Ky. 749, 199 S. W. 1064; *Jefferson Dry Goods Company* v. *Dale,* 257 Ky. 501, 78 S. W. 2d 305, 307; *Mullins* v. *United Carbon Company,* 282 Ky. 111, 137 S. W. 2d 1089, 1090. The duty is a continuing one, and the Kentucky Rule is that even conceding this utility applicance when first constructed was placed in such a condition that it was safe, the care demanded of the utility did not end with the original construction. The Kentucky Court of Appeals stated the rule in *McWilliams* v. *Kentucky Heating Company, supra,* page 27, as follows:

> "The duty imposed upon appellees to exercise ordinary care in the maintenance of these gas mains imposed upon them the duty of exercising ordinary care at all times while the mains were in the public road, to guard against injury through any reasonable and proper use of the road, in view of the conditions to which its use under modern methods might be subjected."

See *Trustees of the Village of Canandaigua* v. *Foster*, 156 N. Y. 354, 50 N. E. 971, 972; *Louisville Home Telephone Company* v. *Gasper*, 123 Ky. 128, 93 S. W. 1057; 25 *Am. Jur.*, "Highways," Section 504, "Appliances and Structure of Public Utilities," page 785.

Thus, under the doctrine of *McWilliams* v. *Kentucky Heating Company, supra,* where it was shown that a particular type of steam roller utilizing spikes on its rear wheels had been in use for approximately twelve years, that such type was neither new nor novel, and the gas company could have anticipated this accident resulting from the spikes breaking a gas line located too close to the surface. In the present case the evidence is uncontradicted that the Louisville Gas & Electric also anticipated the injury involved in this case and sought to minimize the hazard by placing rivets in the manhole covers, especially when located in crosswalks in intersections where people walk. Thus, the injury here having been anticipated by others for a long time, there is nothing new or novel in this situation. Compare *Stern* v. *International Railway Company,* 220 N. Y. 284, 115 N. E. 759, 761.

The general rule of law in Kentucky as to whether a hole in a street, sidewalk or crosswalk is of sufficient size or condition to constitute negligence is a question for the jury. *City of Louisville* v. *Haugh,* 157 Ky. 643, 163 S. W. 1101, 1102; *City of Cynthiana* v. *Scrsion,* 261 Ky. 667, 88 S. W. 2d 682; *City of Bowling Green* v. *Ford,* 263 Ky. 523, 92 S. W. 2d 744; *City of Louisville* v. *Verst,* 308 Ky. 46, 213 S. W. 2d 517; *City*

of Covington v. *Exterkamp*, 158 Ky. 599, 165 S. W. 967. Especially is this true when the hole is considered in the nature of a trap, and the question is whether a street or a sidewalk is reasonably safe for use of pedestrians a jury question is presented. *City of Covington* v. *Exterkamp, supra; City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387. *City of Louisville* v. *Verst; supra,* at page 520, clearly establishes that the question of whether the defect constitutes actionable negligence is a question for the jury, and rejects the Michigan rule that a slight defect is not actionable. The rule in Kentucky is also clearly set forth in *City of Louisville* v. *Haugh,* 157 Ky. 643, 163 S. W. 1101, 1102, as follows:

> "The distinction between a hole in the street which would render a street unsafe and a hole that would not do so is a thing practically impossible to define. The depth of the hole alone would not control such characterization. Its shape, its size, its location with reference to the street lighting, its location with reference to the conditions and extent of public travel, and many other considerations would enter into the determination of the question of the effect of such hole upon the safety of the street, and would make the inquiry as to whether such hole amounted to a want of ordinary care upon the part of the city peculiarly a question for the jury."

The above rule has been applied to defects in the street where there have been holes in gratings or other instrumentalities. *Upham* v. *City of Boston,* 187 Mass.

220, 72 N. E. 946 (glass disk out in Hyatt light); *Mooney* v. *Hauck*, 1 Ohio App. 435, 35 Ohio C. C. 134, 18 Ohio C. C. N. S. 116, affirmed 112 N. E. 1084 (62 A. L. R. 1086) (glass missing in grating); *Niehaus* v. *Caryfield*, 269 N. Y. S. 335, 340 (glass missing in grating); *Monsch* v. *Pellissier*, 187 Cal. 790, 204 P. 224, 225; *Sanders* v. *First National Bank*, 183 Okl. 112, 80 P. 2d 207, 209 (glass prism missing in grating); *Holbrook* v. *City of Monroe*, 157 So. 566 (La.) (small water pipe—heel of woman caught in the hole); *Bosler Hotel Company* v. *Speed*, 167 Ky. 800, 181 S. W. 645, 647. In *Holbrook* v. *City of Monroe*, 157 So. 566 (La.), a lady caught her heel in a cut-off pipe which was located in the sidewalk. The Louisiana Court in viewing the situation presented by the facts, with particular emphasis on the nature of the construction of women's heels, stated that it is common knowledge that the average heel of a woman's shoe is small enough to enter a pipe such as this with a diameter of two and one-half inches. To leave such a pipe open on a much-used sidewalk in a city is clearly a defect in the sidewalk and is not a trivial defect, but is more in the order of a trap which is calculated to cause injury, at least to feminine pedestrians, who wear smaller shoes with smaller heels on them than men. The Court went on to say that it cannot be said that the plaintiff was not using ordinary care when she stepped with her heel into this hole when it was practically flush with the surface of the sidewalk. The Court stated "to so hold would be equivalent to finding that a pedestrian is required to keep his eyes glued to the sidewalk and

to look where he was stepping before each step, which is not the law in this State or any other State of the Union." Thus, from the very fact that the hole is small the Louisiana Court felt that the hole was more in the nature of a trap and less likely to have been seen than if it had been larger.

As shown from the District Court's Opinion and the proof of Western Union itself, this cover is not identical with all that Western Union has, for it has covers without holes in them. In addition, it is not the same safe method used by other utilities in Louisville to guard against the very thing that occurred here. The question is not what is the standard of care in New York or Cincinnati, but what is the standard of care in Louisville, Kentucky, concerning the hazard here involved.

In defense, Western Union relies upon the "common use" doctrine. The argument here made is completely disposed of in accordance with the Kentucky law in the Opinion of the trial judge, Judge Brooks, in his Opinion in this case reported in 141 F. Supp. 328. The rule as to "common use" as a defense is the same in Kentucky as set forth by Justice Holmes in *Texas & P. R. Company* v. *Beyhmer,* 189 U. S. 468, 23 S. Ct. 622, 47 L. Ed. 905, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." In the recent case of *C. D. Herme Inc.* v. *R. C. Tway Company,* 294 S. W. 2d 534, 537 (Ky., 1956), the Court

of Appeals of Kentucky has stated as to negligence of manufacturers the test is not what other manufacturers are doing, or what is customary in the trade or industry, quoting *Prosser, Torts*, First Edition, Section 37, as follows:

> "Even an entire industry, by adopting careless methods to save time and effort or money, cannot be permitted to set its own uncontrolled standard. And if the only test is to be what has been done before, no industry will have any great incentive to make progress in the direction of safety."

Thus, the question becomes one that should be submitted to the jury in the light of all the circumstances.

In *Barnes* v. *F. C. Gorrell & Sons,* 296 Ky. 583, 177 S. W. 2d 395, the Kentucky rule as to the question of the practice of others as a defense is set forth in a clear and simple fashion. As laid down in *Barnes* v. *F. C. Gorrell & Sons, supra,* the rule is that while proof of the defendant's conforming to the practice of others in performing the same act is admissible in evidence, it is not conclusive of the question of negligence, and the matter must ordinarily be submitted to the jury. However, where the defendant by uncontradicted evidence has affirmatively established that the act complained of was performed in accordance with the usual and customary manner of persons engaged in a like business, it devolves upon the plaintiff to produce evidence that conforming to such practice or custom constitutes negligence. In *Barnes* v. *F. C. Gorrell &*

Sons, supra, this rule was applied because no evidence was introduced to show that there was any different manner of performing the work complained of.

The same is true in the case tried by this firm in *Ellis* v. *Louisville & Nashville Railroad Company*, 251 S. W. 2d 577 (Ky.). In that case no evidence was introduced to the contrary as to the method of performing the work involved in that particular case. Thus, on the uncontradicted evidence in both the Ellis case and the Barnes case compliance with the usual and customary method doing business was shown. However, this rule does not apply here (R. 17a—trial Court's Opinion), because it was specifically shown in the plaintiff's proof that the Louisville Gas & Electric Company, one of the largest owners and maintainers of manholes and manhole covers in the city of Louisville, had adopted another practice to avoid the very hazard here presented. That practice was to place rivets in the holes so there would be no hole for a woman's heel to go through while walking over the manhole cover (R. 65a). Utilizing the plaintiff's own witnesses upon cross-examination (R. 79a), it was clearly shown that the purpose of so applying these rivets by the Louisville Gas & Electric Company was to protect from the hazardous condition resulting from the holes being in the manholes, especially when located in the crosswalks. This was not a new practice, but had been going on for approximately fifteen years (R. 179a). Thus, from the evidence it was clearly shown that in the city of Louisville, Kentucky, an ordinary prudent operator of a utility having manhole

covers has for a long period of time, forseeing the possibility of the injury that occurred here, placed rivets in its manhole covers to minimize such a hazard. Plaintiff's Exhibit 3 (R. 251) shows that in crosswalks the Sewer Commission has done the same thing, for it has a solid manhole cover present. The Southern Bell Telephone Company has not placed any manhole covers with holes in them in crosswalks for the last five years (R. 155a). Thus, it is perfectly apparent that there is a conflict of evidence, which would call for the trial Court's submitting the case to the jury as the minds of reasonable men might differ as to what the ordinary prudent man would do to protect pedestrians in crosswalks from the hazards of holes in the manhole covers that would act as traps to catch the heels of women.

Greater Louisville First Federal Savings & Loan Association v. *Stone*, 242 S. W. 2d 739 (Ky.), is not applicable to the present case. The plaintiff relies upon this case as the basis for its so-called "common use" doctrine. However, the rule there set forth simply doesn't apply, because the evidence in the case shows that in the city of Louisville in crosswalks there is no "'common use" such as the Petitioner contends there is. Thus, the present case is clearly distinguishable on the facts (R. 17a—trial Court's Opinion). In that case a small child was burned due to the fact that there were uncovered radiator pipes around the banking building of the Greater Louisville Frst Federal Savings & Loan Association. The Court stated that it was a matter of common knowledge that uninsulated

radiator pipes existed everywhere. The Court stated, with reference to radiators and hot stoves, the practice of utilizing them was so usual and widespread that no property owner would be held liable to anticipate that an injury would occur by reason of the existence of the common-place condition. There was no evidence introduced showing a better method of doing the job by covering the pipes. But here the evidence clearly shows that the largest owner of manhole covers did not have any holes in the covers when they were located in crosswalks. In addition, the Exhibit 3 also shows the Sewer Commission (R. 139a) did not have any holes in the cover it had in this crosswalk. In addition, the plaintiff's own evidence showed that it, when it thought it reasonable, placed solid covers over its manholes (R. 198a).

The basis for the rule announced in the *Greater Louisville First Federal Savings & Loan Association* v. *Stone*, case, *supra*, is that it grew out of fact situations involving injury and damage resulting from a plaintiff's contact with an instrumentality in common use, and, in addition, to its being in common use, the instrumentality being found possessed of a visible, open, and notorious capacity for meting out injury and hurt.

In Kentucky the obviousness of the inherent danger of the particular instrument is the basis for the rule. Many items which are in common use are capable of inflicting injury. However, if the peculiar capacity for injury or hurt of the item is not obvious

and notorious, a plaintiff seeking relief against the defendant responsible for the proper manufacture, installation, maintenance or repair of such an instrument causing the injury is not properly faced with a directed verdict against him upon the common use rule. Certainly, a more apt name for the rule would be "obvious danger rule," since the rule is applied only where the instrumentality involved is obviously capable of inflicting injury, yet is never applied to an instrument which, although in common use, does not have the obvious capacity for hurt and injury.

Petitioner submits that the holes in the defendant's manhole cover did not constitute an obvious danger, notorious for their capacity to injure the plaintiff. Certainly, that cannot be compared to a red-hot stove, an uncovered steam radiator pipe or an open can of gasoline in close proximity to fire or a spark.

McNeal v. *City of Louisville*, 287 Ky. 83, 151 S. W. 2d 749, is not applicable. In this case, the plaintiff proved only that she caught her heel in a catch basin in a crosswalk and that she was caused to fall. Plaintiff admitted in her testimony that there was nothing wrong with the construction, maintenance or repair of this catch basin. There was no evidence introduced by the plaintiff tending to show that persons other than the defendant, who maintained catch basins, took precautions to guard against the injury similar to that experienced by the plaintiff. Because of the plaintiff's complete lack of showing any negligence, the trial Court directed a verdict for the defendant, and this action was affirmed by the Kentucky Court of Ap-

peals. Certainly, it takes no ingenuity to see the difference between this and the case before this Court at the present time. In our case, plaintiff proved that other businesses and organizations in Louisville maintained manhole covers. Plaintiff further proved that it was the practice of these people to provide a cover for the holes which are found in the top of manhole covers, especailly when located in crosswalks. Thus, there was evidence to show that responsible concerns in Louisville, Kentucky, found it reasonably prudent to take the precaution of plugging these holes. It was further shown that defendant did not take such precautions. Thus, clearly, Mrs. Sparks met the burden of proving that the manhole cover was improperly constructed and maintained, resulting in a condition which Western Union permitted to exist, which was dangerous to travelers upon the highway. Of course, a catch basin is essentially different in that it is designed for the purpose of receiving water from the street in order to place it in the sewer. Its holes are large enough to attract attention. However, in the present case the manhole cover is solid, except for the four small holes. Other companies in Louisville have anticipated the danger that caused this accident and have taken steps to remedy it. Thus, the case is not applicable. Therefore, here more was shown that merely the plaintiff's heel becoming caught in the grating, but the plaintiff met the burden of showing that reasonable, prudent utility operators in the city of Louisville had anticipated this matter and had taken steps to correct it.

City of Louisville v. *Moore*, 267 Ky. 536, 102 S. W. 2d 989, has no application to the present case, because there was no showing at all that the particular catch basin involved was unsafe or that its warped condition caused the plaintiff to fall. The City Engineer testified concerning the number of catch basins in existence and that there were a number of the old type still being used that were installed in 1918. He further said the design was abandoned, but that there were new specifications calling for a catch basin frame and grating of different construction. The space between the grating bars on the new construction was one and one-half inches, while the grating between the bars on the catch basin involved was one and one-eights inches. Moreover, the City Engineer testified that the grating was all right, even though it was warped. However, it is to be noted in the Moore case that there was no contradiction in the case whatsoever concerning the method of properly maintaining the catch basin. Again, the distinction is that here there is a conflict in showing that manhole covers can be maintained in a safer condition by the use of rivets, and is so maintained by the largest single proprietor of manhole covers in Louisville. In *City of Louisville* v. *Moore*, *supra*, the plaintiff relied upon the *res ipsa* doctrine, which the plaintiff did not do in the present case. Again, the plaintiff introduced evidence to show that reasonable men in the operation of their utility in the city of Louisville have anticipated this danger. The evidence clearly shows that the Louisville Gas & Electric Company and the Sewer Commission anticipated the dan-

ger of someone being injured by catching a shoe in one of these holes, and either installed a solid manhole cover in the crosswalk, or in the exercise of reasonable diligence provided a guard by way of the rivets in the holes against such danger. Certainly, it cannot be said, as a matter of law that this preventative action by this reputable company was not what a reasonable man would do. Therefore, the question of what is reasonable procedure is properly for the jury. This question was properly submitted to the jury at the trial, and the jury concluded that the reasonable, prudent thing to do with respect to these holes was to cover them so that persons who walked on them, exercising due care, would not be subject to injury.

The quotation on page 10 of the Petition from *Ellis* v. *Louisville & Nashville Railroad Company*, 251 S. W. 2d 577, 579 (Ky.), which is an edited excerpt from *38 Am. Jur.*, "Negligence," Section 34, pages 679-682, is not applicable here when the whole section is read, for it clearly shows that the Court of Appeals had before it at that time only the question of undisputed evidence of custom establishing a method by which an ordinary, prudent person operated its business. The key to the whole section is in the following language:

> "The conclusion to be reached upon undisputed evidence which shows that the defendant acted in accordance with the uniform custom of persons engaged in like business, in the absence of any evidence showing that such custom is negligent should be that the defendant did not act negligently."

However, here it was clearly shown that there is no uniform custom concerning holes in manholes covers and, therefore, the question was clearly one for the jury.

McQuillan v. City of New Orleans, 18 So. 2d 218 (La.), is not applicable to the present problem because of the nature of the judicial system of the State of Louisiana. Louisiana is different from all the other forty-seven States of the Union, in that by its *Constitution, Article 7*, Sections 10, 29, all appeals are upon law and fact, and, hence, a jury's findings are not binding on the Appellate Court, *III Martindale-Hubbell, "Louisiana Law Digest," "Appeal and Error," "Scope of Review."* Thus, the Appellate Court's conclusion that the sidewalk was reasonably safe for a pedestrian who was reasonably shod does not touch the problem of a submittable jury issue. However, the Court did not hold that there was nothing to submit to the Court as a matter of law on the pleadings, and it is to be noted at page 219, under the Louisiana practice, the city's exception of no right or cause of action was overruled, and the matter was tried out after the city had answered before the Court. Again, it should be also noted that there was no evidence introduced of a different method of construction of the grating to meet the purpose for which the holes were installed. In the present case this has been done, and, therefore, the case is not applicable. It is simply the conclusion of a judge acting as a jury in his findings of fact in a matter not heard by him. However, the case is of authority to the effect that there is a question of fact

to be decided by the Court, because the allegations in the complaint were held sufficient to state a cause of action. It is also to be noted that the abutting property owner compromised the claim, and the case continued against the City of New Orleans alone. Thus, from the factual situation and the procedure involved it is not authority one way or another concerning the question of whether or not this case should have been submitted to the jury. Compare *Holbrook* v. *City of Monroe*, 157 So. 566 (La.), holding to the contrary.

Haar v. *Vogelman Bakery Company*, 312 Ky. 307, 227 S. W. 2d 423, is not in point as it involves the question of attractive nuisance. However, the case involved gasoline in a can which spilled while on fire injurying the plaintiff. As stated by the Trial Court (R. 15a, 16a) for the common use doctrine to apply, it must be shown that the article involved is generally known to the public to be dangerous. There is certainly a vast difference between an explosive fluid such as gasoline and a manhole cover. The gasoline will burn whenever it comes in touch with fire, but stepping on a manhole cover is not necessarily dangerous for all covers do not have holes in them. The latter part of the quotation has no applicability because others have manhole covers, and when they are in places where people walk, they are able to protect the pedestrian and the public. The custom in Louisville has been set by the largest maintainer of manholes. There is no proof that a solid cover, or rivets could not be placed in the holes in this cover. There are other manholes of Western Union in this intersection that

could well have taken care of the ventilation. Thus, there is no reason for Western Union to be "chargeable with habitual or continuous negligence" except by its own choosing. Others have been doing the same job in a safer manner for fifteen years (R. 178a- 185a; 63a-81a). Certainly, this is a showing of an anticipation of danger and the exercise of reasonable diligence by others in the field, and submitted an issue of fact for the jury as to whether or not reasonable, prudent men would differ as to the exercise of reasonable care in the maintenance of its manhole covers by Western Union.

The Sixth Circuit has had recent occasion to deal with the defense of custom. In *Northwest Airlines* v. *Glenn L. Martin Company*, 224 F. 2d 120, 129 (C. A. 6th), it held as to the question of whether custom established a defense as a matter of law, that it did not, and that customary practice is not ordinary care, but it is evidence of ordinary care to be properly considered by the jury. The same rule is applicable in Kentucky, for it was held that evidence that the defendant has not adopted methods or precautions to prevent injury that have been adopted by other persons is admissible on the question of negligence and makes a jury question. *McKibben* v. *Bakers*, 1 B. Mon. 120, 40 Ky. 120, 122 (1840). See also *Clark's Adm'r.* v. *Kentucky Utilities Company*, 289 Ky. 225, 158 S. W. 2d 134; *Louisville Home Telephone Company* v. *Gasper*, 123 Ky. 128, 93 S. W. 1057; *C. D. Herme, Inc.* v. *R. C. Tway Co.*, 294 S. W. 2d 534, 537 (Ky.).

From the foregoing, it is apparent that there is a jury question because from the evidence it is perfectly apparent that reasonable men might differ as to the duty of ordinary care in this situation. *City of Louisville* v. *Haugh*, 157 Ky. 643, 163 S. W. 1101. The Trial Court in its memorandum clearly pointed out the distinguishing features of the cases relied upon by the Petitioner as applied to the present case. Approximately one-fifth of the manhole covers in the City of Louisville are protected for the purpose of avoiding this type of accident. The Trial Court (R. 17a) correctly applied the rule in this situation of *Texas & P. R. Company* v. *Beykmer*, 189 U. S. 468, to the effect that what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. The Trial Court correctly applied the rule of the Sixth Circuit as stated in *Empire Oil & Refining Company* v. *Hoyt*, 112 F. 2d 356, 361, that the proof of custom in view of the conflicting evidence was insufficient to sustain Western Union's claim of immunity and the matter was properly a question for the jury.

Reference has been made in the Petition (page 11) to the necessity for having holes in the manhole covers for the purpose of ventilation in order to avoid explosions from gas collecting in the vault. There is a strict conflict in the evidence as to whether it was necessary for this particular manhole cover located in a crosswalk to have holes in it. Many utilities do not have holes in the covers (R. 193a). Western Union's Engi-

neer admitted holes are optional (R. 193a) and that it was not necessary always for ventilation purposes, and a solid manhole may be used where there are other means of taking care of the ventilation (R. 198a). Here, from Plaintiff's Exhibit 3, R. 25a and Defendant Exhibit 1, R. 51a, it is perfectly apparent that outside of the crosswalk Western Union had other manholes which could well have furnished such ventilation.

In addition, plaintiff's and defendant's proof showed that the gas that was heavier than air would remain in the manhole, regardless of the number of holes that the cover possessed (R. 71a, 179a, 206a). The covers are not placed in tightly and there is room around the edge of the manhole for the gas that is lighter than air to escape (R. 179a). It was further shown that for the purpose of workmen going into the holes the standard practice is for them to test, and if there is gas in the hole, to take it out by means of fans (R. 66a, 179a). In addition, the rivets are not placed tightly in the manhole covers and there is room for the gas to go around them in the case of the Louisville Gas & Electric Company. It was further shown by the City Engineer (R. 124a) that at no time had he ever made any complaint to the Louisville Gas & Electric Company that it had stopped up the holes on its manhole covers because he thought there was a danger of a gas explosion resulting from the practice. Thus, it is clear that there is a conflict of evidence and a jury question as to whether these holes were necessary as to this particular manhole cover in this particular

crosswalk for the purpose of preventing an explosion. The jury having returned a verdict after hearing proof in favor of the plaintiff has considered these issues, and this Court should not overrule it as reasonable men might differ upon the necessity for these holes upon the proof presented.

B. Should the District Court have directed a verdict for Western Union Telegraph Company upon the ground that Mrs. Sparks' injury was caused by her own contributory negligence when she was crossing for the first time in two months a busy intersection in the crosswalk and watching for vehicular traffic that may turn in her path and inadvertently steps upon a manhole capped by a cover containing holes which caught her heel?

A fair reading of the evidence of Mrs. Sparks (R. 25a-36a, 45a-53a) in this case will convince the Court that she was not guilty of contributory negligence or assumed risk. The plaintiff was crossing Market Street at the intersection of Fourth and Market on the east side of Fourth Street in a designated crosswalk. The traffic light had turned green for her, and there were automobiles moving north and south on Fourth Street (R. 28a). The northbound traffic may make a right turn into Market off Fourth Street across the crosswalk in which she was walking (R. 28a). The automobiles on Market Street had stopped in obedience to the light (R. 28a). As she walked across the street it was necessary, and she did, watch and observe the traffic that was approaching or ready to start

across or through or around the intersection (R. 28a). While she was so walking her heel caught in one of the holes in the cap, and threw her down (R. 29a). She had not seen the hole before that time (R. 29a). She had not been across this intersection since the week before Christmas in 1953 until the date of injury, March 8, 1954—a period of better than two months (R. 47a). The holes in the cover were not visible to her (R. 48a) as she was not looking for them and not looking down at the walk as she crossed (R. 47a). She had not observed the holes in the covers previously (R. 47a) although admittedly while employed at Bacon's she had crossed this intersection many times (R. 46a) and had generally seen the circular manhole cover (R. 47a) while passing. She had also occasionally seen manhole covers with holes in them (R. 50a) in other parts of the City.

It is hard to see any basis for contributory negligence on the part of Mrs. Sparks when she had not been across this intersection for two months and had no knowledge of any defect in the walk. While Mrs. Sparks was crossing in the crosswalk, the rule in Kentucky is that, as to defects in the street, a pedestrian may cross the street at any point without imputation of negligence. *City of Louisville* v. *Haugh*, 157 Ky. 643, 163 S. W. 1101, 1102. All parts of the street are to be kept in safe condition for pedestrians. *City of Glasgow* v. *Gillenwaters*, 113 Ky. 140, 67 S. W. 381. There is only one degree of care required of those using the public thoroughfare, and that is ordinary care. *City of Louisville* v. *Haugh, supra*, page 1102.

One using the public street is not required to anticipate danger, but may proceed upon the assumption that the walk way is in a reasonably safe condition. *City of Louisville* v. *Verst,* 308 Ky. 46, 213 S. W. 2d 517, 520. This is true although the person has passed the defect many times it is still a jury question as to whether he had knowledge of the defect. *City of Lebanon* v. *Graves,* 178 Ky. 749, 199 S. W. 1064, 1067. It is a well established general rule that persons using a public way which is in constant use, when their attention has not been called to any obstructions or perils thereon, have a right to assume, and to act on the assumption, that the way is safe for ordinary travel. 25 *Am. Jur.,* "Highways", Section 461, page 749. *Merchants' Ice & Cold Storage Company* v. *Bargholt,* 129 Ky. 60, 110 S. W. 364.

The same rule is true in crossing streets. *City of Ashland* v. *Boggs,* 161 Ky. 728, 171 S. W. 461, 464; *Flynn* v. *Town of Waltertown,* 173 Mass. 108, 53 N. E. 147; *Dale* v. *City of Syracuse,* 24 N. Y. Supp. 968, affirmed 148 N. Y. 750, 43 N. E. 986. On the above authorities it is impossible to say that one crossing the street must keep his attention fixed on the ground. The greatest danger is that of being run over by a passing vehicle. Nor is it required that a critical examination be made of the covering of a manhole before stepping on it. *McLaughlin* v. *Kelly,* 230 Pa. 251, 79 A. 552, 555; *Dickson* v. *Hallister,* 123 Pa. 421, 16 A. 484, 487. As the Trial Court found, the presence of a manhole cover is not necessarily a danger signal for the pedestiran for there are manhole covers without

holes in them or with one hole in them (R. 16a). *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387. Moreover, when one's attention is diverted from the street at the time of encountering the defect by some cause adequate to effect the result, it is an issue for the jury as to the contributory negligence of the pedestrian. *City of Ashland* v. *Boggs,* 161 Ky. 728, 171 S. W. 461, 463; *Merchants' Ice & Cold Storage Company* v. *Bargholt,* 129 Ky. 60, 110 S. W. 364. Watching heavy traffic at an intersection and the performance of a legal duty to maintain a lookout for cars was such an excuse for not seeing the hole as to clearly make a jury issue. *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387; 25 *Am. Jur.,* "Highway", Section 468, page 760.

The governing cases here making the question of contributory negligence of Mrs. Sparks a jury question are *City of Louisville* v. *Wheeler, supra,* as to divergence of attention from defect, and *City of Louisville* v. *Verst, supra,* as to knowledge of defect from passing the spot many times when the defect was in the nature of a trap. See also *City of Lebanon* v. *Graves,* 178 Ky. 749, 199 S. W. 1064, 1067.

As to contributory negligence the case of *Crain* v. *City of Louisville,* 259 S. W. 2d 52, does not overrule the Verst case as Petitioner contends. The defect in the sidewalk which injured Mrs. Verst was a hole in the nature of a "trap". In the Crain case the defect contained none of these elements of a "trap" as it was obvious, and the plaintiff was fully aware of its existence as she lived six or seven years two doors from the

defective place which had been there all the time. Furthermore, since the plaintiff admitted that she was paying no attention to her footing, the Court of Appeals held, as a matter of law, that she was contributorily negligent. But in the present case attention cannot be fixed upon the crosswalk because in crossing the street the pedestrian must be on the lookout for automobiles for that is the source from which danger usually comes. *City of Ashland* v. *Boggs,* 161 Ky. 728, 171 S. W. 461, 464. The Crain case has no application to this case because it was not proved that the plaintiff, Mrs. Sparks, had actual knowledge of the dangerous characteristics of defendants' manhole cover, nor was it shown she was not exercising due care for her safety. The holes in the manhole cover were not obvious and notorious, and, therefore, cannot be placed in the same category as the rough and uneven sidewalk. *City of Lebanon* v. *Graves, supra.*

Looking at the Crain case further, it is interesting to note that the Court mentioned the dissent of Judge Stites in *Monroe* v. *City of Louisville,* 278 Ky. 648, 129 S. W. 2d 119. In that case Judge Stites was of the opinion that a person walking along a smooth sidewalk was not required to exercise as high a degree of care as a person walking on an uneven and rough sidewalk. Thus, it seems that the Court indicated that in cases where the sidewalk was obviously defective, and plaintiff admitted paying little or no attention to where she was walking (these facts represent plaintiff's conduct in Crain case), then it would be proper for the lower Court to direct a verdict. The Court did not say, as

Western Union would have us believe, that merely because a defect which was not obvious had existed for some time in the sidewalk that the question was not one for the jury as to defendant's negligence and plaintiff's contributory negligence. *Louisville & Nashville Railroad Company* v. *Mulverhill,* 147 Ky. 360, 144 S. W. 83, 85-86.

As to the Crain case it should be noted that Judge Cammack spoke for the Court of Appeals of Kentucky, and he also spoke for the Court in *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386. However, Judge Cammack did not mention by name or otherwise indicate that the Wheeler case was overruled.

As to *Interstate Coal Company* v. *Deaton,* 148 Ky. 160, 146 S. W. 396, it is sufficient to say there is a big difference between small holes that operate as a trap and a beam in a barn as to an obvious and known defect of which a person assumes the risk. Certainly, the defect in the present case is not so obvious as to justify an assumption of risk defeating the plaintiff's recovery. *City of Lebanon* v. *Graves, supra,* page 1067. The question of whether or not it was so obvious is certainly a jury question in accordance with the above cited authority. Although *Interstate Coal Company* v. *Deaton, supra,* was approved as stating the correct principle of the law in *Cardwell* v. *Haycraft,* 268 S. W. 2d 916, 918 (Ky.), this case clearly illustrates that a jury question is presented. In the Cardwell case the issue was submitted to the jury concerning proximate cause and a new instruction was

ordered, even though it was conceded that there was a possible assumption of risk. However, this case is clearly not applicable to the present situation for in the Cardwell case the plaintiff was an expert mechanic working on a truck and he knew all about the danger before the truck fell upon his arm. This is an entirely different situation from a lady crossing a street.

From the foregoing it is clear the Trial Court and the Court of Appeals correctly ruled that the question of contributory negligence of the plaintiff should be submitted to the jury, and was not a defense as a matter of law.

THIRD.

The decision is not unique or unprecedented and does not jeopardize the future use of safety vents in manhole covers.

It is true there is a conflict of evidence in this case as to the use of the rivets in the holes by the Louisville Gas & Electric Company. However, the evidence of Western Union itself shows that where necessary to protect equipment they use solid manhole covers where the situation is as here in that other manholes not in the crosswalk provide ventilation. No evidence was presented that in the City of Louisville there has ever been an explosion in a manhole of the Louisville Gas & Electric Company because there rivets are placed therein. The rivets are not air tight and there is room for adequate ventilation around the side of the cover and around the rivets. As far as anyone seeking to recover because of holes in gratings where pedestrians

walk the books are full of such cases. *Mooney* v. *Hauck*, 1 Ohio App. 435, 35 Ohio C. C. 134, 18 Ohio C. C. N. S. 116, affirmed 112 N. E. 1084 (62 A.L.R. 1086); *Nichaus* v. *Caryfield*, 269 N. Y. S. 335; *Monsch* v. *Pellissier*, 187 Cal. 790, 204 P. 224; *Sanders* v. *First National Bank*, 183 Okl. 112, 80 P. 2d 207; *Holbrook* v. *City of Monroe*, 157 So. 566 (La.); *Upham* v. *City of Boston*, 187 Mass. 220, 72 N. E. 946. The sole question in this case concerns manhole covers in crosswalks where great numbers of people walk. It doesn't concern manhole covers in other portions of the street. We have a downtown intersection, and the question of whether or not these covers may be placed as traps in intersections is the only issue involved. Other responsible public utilities have seen fit either to place rivets in the holes when the cover is in the crosswalk or not to place their manhole in a crosswalk. Thus, the issue here simply involves a question of reasonable care by utilities in not making the crosswalks of a city subject to a trap as far as female pedestrians are concerned. The statements made on page 13 of the Petition are not accurate. Western Union's own expert does not substantiate them, and Western Union itself does not always use manhole covers with holes when other ventilation is available from other manholes as there was here. Thus, the case does not have the effect that the Petitioner claims. It merely requires the Petitioner to exercise in crosswalks the standard of care as to pedestrians that it would apply to the protection of its own equipment in the manhole if water leaked into it, or to utilize the same care that

responsible utilities in the City of Louisville have been exercising for fifteen years. This utility with only 150 manholes in the City of Louisville can certainly exercise the same degree of care as to covers located in crosswalks that the Louisville Gas & Electric Company exercises with better than 1,000 manhole covers in the City without complaint from the City Engineer or an explosion. A better way has been shown without the danger of any explosion. This better way has been in use for fifteen years. Certainly, evidence of better ways of performing its function in maintaining the appliance may be considered as evidence of negligence. *Louisville Home Telephone Company* v. *Gasper,* 123 Ky. 128, 93 S. W. 1057, 1058.

FOURTH—CONCLUSION.

It is respectfully submitted for the foregoing reasons that the Petition of Western Union for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

R. P. HOBSON,
JOHN P. SANDIDGE,
S. J. STALLINGS,
WOODWARD, HOBSON & FULTON,
Of Counsel.

CERTIFICATE OF SERVICE.

I, John P. Sandidge, Counsel for Mary Ruth Sparks, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 5, 1957, I served a copy of the foregoing Response to the Petition for Writ of Certiorari on the Petitioner, Western Union Telegraph Company, by that day depositing a copy thereof in a United States Post Office in a duly addressed envelope, with first class postage thereon prepaid, addressed to its counsel of record, William Marshall Bullitt, at 1700 Kentucky Home Life Building, Louisville 2, Kentucky.

John P. Sandidge,
1805 Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Mary Ruth Sparks.

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Supreme Court of the United States

October Term, 1957

No. 259.

THE WESTERN UNION TELEGRAPH COMPANY, *Petitioner*,

v.

MARY RUTH SPARKS, - - - - *Respondent.*

RESPONSE OF MARY RUTH SPARKS TO REPLY BRIEF OF WESTERN UNION TELEGRAPH COMPANY.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

I. Under Kentucky Law the Question of Western Union Telegraph Company's Negligence Was Properly Submitted to the Jury.

The respondent, Mary Ruth Sparks, relies on the statements made in her Response to the Petition for Writ of Certiorari filed herein as to most of the points raised in the Reply Brief of Western Union Telegraph Company.

The respondent wishes to point out that in the Trial Court's decision reported in 141 F. Supp. 328 and adopted by the Circuit Court of Appeals for the Sixth

Circuit in 244 F. 2d 956, the question of the negligence of Western Union Telegraph Company in this matter is analyzed, and the arguments made here by Western Union Telegraph Company are answered completely under the Kentucky law.

By reading the evidence it is apparent that the statement of Western Union of the practice of the Louisville Gas & Electric Company in placing rivets in the holes is by "uncontradicted evidence . . . a spacious, haphazard and dangerous expedient," is not true. Adequate ventilation (66a) is available around the rivets and the cap for the escape of gases lighter than air (179a-180a). Gasses heavier than air will not escape regardless of the holes in the cover (71a). As for the "detailed study," counsel for the petitioner required a witness (73a), during a recess of the trial, to conduct an investigation of the use of rivets by the Louisville Gas & Electric Company, and rivets were found in the holes in the principal area of downtown Louisville (75a-76a). Mr. Bullitt's own associates (160a) reported to him that "in the principal area, or the important parts of Louisville . . . it was said that those manholes and the covers on them did not have holes in them." Moreover, there was never any agreement that this practice became a safety hazard. If there was ever a witness discredited on cross-examination, Mr. H. T. Meiners was it (115a-125a). Certainly, there was a jury question here presented on a conflict of evidence.

Western Union has insisted on bringing into this case the condition of manhole covers in other cities.

On page 5 of the Reply Brief an argument is made based on the manhole covers located at West Broadway and Thomas Street in New York City, New York. The writer has been to New York City, but I am, unfortunately, not familiar with West Broadway and Thomas Street. But the writer knows the situation in Louisville, Kentucky, where the accident occurred and where the evidence in this case clearly establishes from Western Union's own witness, F. W. Russell, that for a period of fifteen years (178a-180a) it has been the company policy of the Louisville Gas & Electric Company to place rivets in the holes in its manhole covers, especially when located in crosswalks for the purpose of the removal of the hazardous condition here presented (65a). As pointed out by the trial Court in its Opinion, there is evidence of a better and safer method, especially in crosswalks, of utilizing manhole covers to eliminate this hazard. In addition to the foregoing, it is true that in the very crosswalk here involved, there is a solid cover over a hole the same size as the manhole here involved. In the last five years Southern Bell Telephone Company has not placed in crosswalks any covers with holes in them (154a). The Trial Court correctly analyzed the problem in its Opinion and concluded that in this situation it was a jury issue as to whether or not Western Union was negligent. For the same reasons it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari on this basis.

Southern Railway Company v. *Walters*, 284 U. S. 190, 76 L. Ed. 239, 52 Sup. Ct. 58, is not applicable,

for in that action there was no proof that a train did not stop and flag as required by the Illinois Commerce Commission prior to crossing a road which was alleged to be the negligence involved. Here, it is undisputed that Mrs. Sparks fell in the hole in the manhole cover belonging to Western Union. There can be no doubt that the hole caused her to fall. Thus, there is no question of proximate cause as there was in the Southern Railway case. Under the doctrine of *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 Sup. Ct. 740, it is respectfully submitted that there is certainly a jury issue in this matter. Under *City of Louisville* v. *Haugh*, 157 Ky. 643, 163 S. W. 1101, this question is for the jury.

McQuillan v. *City of New Orleans*, 18 So. 2d 218 (La.), has been previously distinguished at page 25 of the Response. The case certainly does not overrule *Holbrook* v. *City of Monroe*, 157 So. 566 (La.).

Corthell v. *Great A. & P. Tea Company*, 291 Mass. 242, 196 N. E. 850, 851, is not in point because the proof was not the same. There, a woman caught her heel in a hot-air register, having approximately seventy-two openings seven-eighths of an inch square. Evidence was introduced as to the fact that such registers were in common use. The Massachusetts Court specifically pointed out at page 851 that the fact a certain device or practice is in common use tends to show that the use is not negligent. But that fact is not conclusive of due care, for a large number of persons may be wanting in due care in their usual practices. The Court noted that while the register was in common

and general use, the plaintiff had the burden of introducing evidence warranting a finding of negligence. The Court specifically noted that the defendant's evidence as to common use was uncontradicted, and stated as follows:

> "There was no evidence that registers with smaller openings were in common use."

On page 852 the Court further stated:

> "If, however, the vagaries of fashion had indeed brought into common use for such purposes heels of that description, there is no evidence how long they had been in vogue."

The present case is very different, for here it is clearly shown that the Louisville Gas & Electric Company has anticipated for approximately fifteen years this danger and has taken steps to guard against it in its manholes in the city of Louisville. The petitioner has quoted the Massachusetts Court at page 851, as follows:

> "When the Court can see that the physical facts, with any other evidence that may exist, do not warrant the inference that a reasonable man in the position of the defendant would have anticipated the danger and guarded against it, a verdict for the plaintiff is not warranted."

The appellee submits that the corollary of the statement of law is also true; that if the evidence *does* contain facts showing that a reasonable man in the defendant's position would have anticipated the danger

and guarded against it, then the defendant is not entitled, certainly, to a directed verdict. Thus, the evidence in the two cases is different, and the Corthell case is not authoritative in this situation.

II. The Question of Whether or Not Mrs. Sparks Was Contributorily Negligent Was For the Jury.

It is undisputed that Mrs. Sparks had not crossed this intersection for better than two months prior to the accident (47a). Mrs. Sparks had a duty to watch out for traffic as well as to observe where she was walking. The Kentucky Court of Appeals in the recent case of *Farris* v. *Summerour,* 296 S. W. 2d 708, 710 (Ky.), has stated, concerning the look and see rule upon which the petitioner relies, that there is a duty to see what is obvious or in plain sight unless some excuse is shown for not seeing the object. In the Farris case the Kentucky Court did not apply the rule and did not hold the driver contributorily negligent as a matter of law, for there was an excuse. The watching for traffic at an intersection is certainly such a legal excuse as to justify not seeing the hole. *City of Louisville* v. *Wheeler,* 301 Ky. 222, 191 S. W. 2d 386, 387; *25 Am. Jur.,* "Highway," Section 468, page 760.

Mrs. Sparks' testimony was that she did not see the hole in which her heel went (29a) and that she was watching for traffic while crossing the street in the crosswalk (29a). While watching the traffic, she was not looking directly at her feet and did not see the cover or the holes (47a-48a). Certainly, under these

circumstances the mere stepping on a manhole cover, especially when some are solid or have rivets in the holes, does not amount to contributory negligence as a matter of law.

On page 12 and 13 an effort is made to minimize the lookout required by Mrs. Sparks in crossing the street. There is no dispute that Mrs. Sparks was walking in the crosswalk and that this manhole cover upon which she fell was in the crosswalk. The traffic moving east and west on Market Street had stopped (28a), but that does not mean she did not have to watch these vehicles. Traffic was moving north and south on Fourth Street (27a). An examination of the pictures of this intersection, Plaintiff's Exhibit 2 (25a), will show that there is no great distance between the manhole cover and the eastbound lane of traffic for Market Street. It is not "far north" as the petitioner would have the Court believe. Certainly, the very argument itself, as stated by the petitioner on page 13, shows that a jury issue is involved because it is a matter upon which the minds of reasonable men might differ.

City of Louisville v. *Wheeler*, 301 Ky. 222, 191 S. W. 2d 386, was not overruled by *Crain* v. *City of Louisville*, 259 S. W. 2d 52. Certainly, the two cases are distinguishable on facts because in the Wheeler case the plaintiff did not see the defect because she was looking for traffic approximately thirty feet in front of her. Thus, clearly the question of her contributory negligence is one for the jury and is not one to be decided as a matter of law under the Kentucky rule. Thus, as pointed out by the Trial Court in *Sparks* v.

Western Union Telegraph Company, 141 F. Supp. 328, 331, it cannot be said, as a matter of law, that manhole covers are inherently dangerous to anyone coming in contact with them as there are covers without holes as well as with holes. Thus, the question was properly one to be submitted to the jury, as it cannot be overlooked ". . . that the particular location of manhole covers in the streets and sidewalks is extremely important in determining their potential or danger."

Stoffel v. *N. Y., N. H. & H. R. Company*, 205 F. 2d 411 (C. A. 2d), is not applicable, for there an expert lineman, knowing all the facts and circumstances, deliberately exposed himself to an electric wire that contained high voltage. Here, there was no such knowledge on the part of the plaintiff who was in the process of crossing a street which called upon her to exercise other duties than to watch the ground only. As stated in *City of Ashland* v. *Boggs*, 161 Ky. 728, 171 S. W. 461, 464, "it seems to us impossible to say, as matter of law, that one crossing a street is obliged to keep his attention fixed on the ground. The danger usually encountered is that of being run over by passing vehicles." Certainly, on this authority there is no question of assumed risk as was present in the Stoffel case, and the question of whether or not Mrs. Sparks was contributorily negligent was a jury question.

CONCLUSION.

It is respectfully submitted that the District Court and the Circuit Court of Appeals correctly decided this question of local law in accordance with the law of the State of Kentucky which was applicable in this diversity of citizenship case. Therefore, the Petition for Writ of Certiorari should be denied.

R. P. HOBSON,
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S. J. STALLINGS,
WOODWARD, HOBSON & FULTON,
Of Counsel.

Certificate of Service.

I, John P. Sandidge, counsel for Mary Ruth Sparks, respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on September , 1957, I served a copy of the foregoing Response to the Reply Brief on the petitioner, Western Union Telegraph Company, by that day depositing a copy thereof in a United States Post Office in a duly addressed envelope, with first-class postage thereon prepaid, addressed to its counsel of record, William Marshall Bullitt, at 1700 Kentucky Home Life Building, Louisville 2, Kentucky.

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